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116.

REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1911.

VOLUME LXXXIX.

HARRY O. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY
HENRY P. STODDART,

DEPUTY REPORTER.

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BY HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska.

FEB 6 1912

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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RULES OF THE SUPREME COURT.

2. (Amended June 26, 1911.) **Submission of Cases.**—A cause shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs.

Rules adopted April 25, 1911.

ABSTRACTS.

16. In all cases the party bringing a cause into this court shall print and furnish a complete abstract or abridgment of the record with references to the pages of the record abstracted. And where the record contains the evidence, it shall be condensed in narrative form in the abstract, so as to clearly and concisely present its substance; provided, that in felony cases when the question to be presented is as to the sufficiency of the evidence the abstract may refer to the bill of exceptions with or without abstracting the same as the parties elect. Such parts of the evidence as bear upon other questions presented must be duly abstracted. The abstract shall contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, with the names of the witnesses and the pages of the direct, cross and redirect examination. The abstract must be sufficient to fully present every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part.

17. **Abstract in Original Cases.**—The rules herein established for printing abstracts shall apply to all cases wherein the court is called on to exercise original jurisdiction. In such cases the plaintiff or his attorney must print and serve such abstract on the defendant or his attorney within thirty days after issue is joined, or, if evidence is taken, within thirty days after the evidence is returned to this court; and the defendant or his attorney in like manner, if he deem the abstract of plaintiff imperfect or unfair, may within twenty days thereafter print and serve upon the plaintiff or his attorney such further abstract as he may deem necessary.

18. Abstracts shall be printed and in all respects, including service and filing, conform to rule 9, and shall be bound separately from the brief. The cost of printing abstracts shall be taxed as provided by rule for taxing costs of briefs.

19. **Form of Abstract.**—Abstracts of record shall be made substantially in the following form:

SUPREME COURT OF NEBRASKA.

John Doe
v.
Richard Roe. } **ABSTRACT.**

Appeal from (or error to).....county.....Judge.

A. B., for plaintiff and appellant (or appellee or plaintiff in error).

D. E., for defendant and appellant (or appellee or defendant in error).

On the.....day of....., 19...., the plaintiff filed petition in court below, stating the cause of action to be:

(Set out only so much of petition necessary to an understanding of the questions to be presented and no more. Omit all formal parts; abbreviate and condense. If there is an appearance, or if no question is raised about summons, return, etc., omit.)

On the.....day of....., 19...., defendant demurred. (State grounds. If defendant filed motion and the ruling thereon is one of the questions to be considered, set it out in the same way.)

And on the.....day of....., 19...., the court sustained (or overruled) the same. (In every instance let every abstract be in chronological order of the events in the case; let each ruling appear in the proper connection. If the defendant pleaded over and thereby waived his right to be heard upon these rulings, no mention need be made of them.)

And on the.....day of....., 19...., the defendant filed his answer setting up his defense as follows: (Set out substance of defense, and reply, if any, omitting formal parts. Frame the abstract so as to present all questions to be reviewed, raised before issue joined.)

At the trial on the.....day of....., 19...., (to a jury or the court, as the case may be) the following proceedings were had:

(Set out so much of the bill of exceptions as is necessary to show the ruling of the court to which exceptions were taken and relied upon during the progress of the trial. In abstracting evidence use the narrative form, abbreviating and condensing, omitting interrogatories except such as may be necessary to a correct understanding of the answers thereto and on which error is assigned.)

INSTRUCTIONS.

Where no objection is made to the giving or refusing of any instruction, omit all, but where there is objection as to the giving or refusal to give any instruction or instructions, set out the whole charge, pointing out specifically the instructions excepted to.

VERDICT.

On the.....day of....., 19...., the jury returned the following verdict into court: (State substance of the verdict.)

(If the case be tried by the court, instead of the instructions and verdict of the jury, set out so much of the findings of fact and conclusions of law, and requests for findings, if any, together with the exceptions relating thereto, as may be necessary to present the errors complained of.)

MOTION FOR NEW TRIAL.

On the.....day of....., 19...., the plaintiff (or defendant) moved for a new trial upon the following grounds:

(Set out the grounds for new trial relied upon, and omit all others.)

On the.....day of....., 19...., the court sustained (or overruled) said motion. (State exception, if any.)

JUDGMENT.

On the.....day of....., 19...., the following judgment was entered: (Set out the judgment or order appealed from.)

On the.....day of....., 19...., notice of appeal was filed in the district court. (If any question is raised on this notice set out a copy.)

If supersedeas bond or other undertaking was filed below, state the fact with the amount and names of sureties.

On the.....day of....., 19...., the cause was filed in the supreme court.

(This outline is presented for the purpose of indicating the character of the abstracts contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: PRESERVE EVERYTHING MATERIAL TO THE QUESTION TO BE DECIDED AND OMIT EVERYTHING ELSE.)

20. Abstracts will be required pursuant to these rules in all cases filed in this court on or after the 7th day of April, 1911, and also in all other cases in which the brief of appellant, or plaintiff in error, or plaintiff in cases of original jurisdiction, is not served or filed on or before June 1, 1911.

In all cases docketed in this court prior to April 7, 1911, either party may prepare and file abstracts of the record under these rules, in which case the cause shall be advanced for hearing.

TABLE OF CASES REPORTED.

	PAGE
Abbott, Wheeler v.....	455
Adams Express Co., Whiteside v.....	430
Ætna Indemnity Co. v. Malone.....	260
Agnew, In re.....	306
Ainlay v. State.....	721
Ainsworth, Village of, Hart v.....	418
Allen v. School District.....	205
Anderson v. Anderson.....	570
Anderson, Barry v.....	332
Aurora Nat. Bank, Hamilton County v.....	256
 Bailey, Griffin v.....	 733
Bankers Life Ass'n, Walden v.....	546
Bankers Life Ins. Co. v. County Board of Equalization.....	469
Barry v. Anderson.....	332
Benedict, McCarthy v.....	293
Benjamin v. Bush.....	334
Biggs, Tate v.....	195
Bill v. Swift.....	437
Bisping, State v.....	100
Blado v. Draper.....	787
Blake v. West.....	794
Blid v. Chicago & N. W. R. Co.....	689
Bolen v. Wright.....	116
Bolton, Mapes v.....	815
Bosley v. Laverick.....	415
Bowker, Drainage District v.....	230
Bowman, Howell v.....	389
Boyd v. Lincoln & N. W. R. Co.....	840
Bradstreet v. Grand Island Banking Co.....	590
Bradstreet, State Bank v.....	186
Bralley, Zentmire v.....	158
Brucker v. Kairn.....	274
Buck, Latson v.....	28
Burke v. Scheer.....	80
Burnes, Dodge County v.....	534
Burrows, McManus v.	250
Bush, Benjamin v.....	334
Bush, In re Estate of.....	334

	PAGE
Butterfield, Cohn v.....	849
Button, Justice v.....	367
Cannell v. Roush.....	289
Central States Cooperage Co., Omaha Cooperage Co. v.....	221
Chambers, Fuchs v.....	538
Chicago, B. & Q. R. Co., Sunderland Bros. Co. v.....	660
Chicago & N. W. R. Co., Blid v.....	689
Chicago & N. W. R. Co., Larson v.....	247
Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission..	853
Chisholm, Summers v.....	324
City of Omaha, Gilliland v.....	668
City of Omaha, McCoy v.....	92
Clarence v. State.....	762
Clark, Perry v.....	812
Clark Implement Co. v. Jay.....	759
Coffin, Haffke v.....	134
Coffman v. State.....	313
Cohn v. Butterfield.....	849
Collins, Hawkins v.....	140
Collins, Pritchett v.....	839
Coon, Smith v.....	776
Cooper, First Nat. Bank v.....	632
County Board of Equalization, Bankers Life Ins. Co. v.....	469
County Board of Equalization, Farmers & Merchants Ins. Co. v....	478
County Board of Equalization, Western Fire Ins. Co., v.....	476
Cowles v. Cowles.....	327
Coykendall, Downey v.....	21
Creighton v. Keens.....	637
Curtice Co. v. Kent.....	496
Cushman Motor Co., Kinder v.....	619
Davison v. Land.....	58
Deines v. Schwind.....	122
De Klotz, Hoover v.....	146
Dettman v. Pittenger.....	825
DeWitt, Village of, Struble v.....	726
Dixon, Girard Trust Co. v.....	557
Dodge County v. Burns.....	534
Downey v. Coykendall.....	21
Drainage District v. Bowker.....	230
Draper, Blado v.....	787
Dungan, State v.....	738
Dunkel v. Hall County.....	585
Edmondson v. State.....	797
Eiseley v. Norfolk Nat. Bank.....	382
Ennis, Polenske v.....	88

TABLE OF CASES REPORTED.

xiii

	PAGE
Estate of Moore, Hazlett v.....	372
Eureka Mfg. Co., Swallow v.....	467
Everson v. Hurn.....	716
Farmers & Merchants Ins. Co. v. County Board of Equalization..	478
Fenton v. Tri-State Land Co.....	479
First Nat. Bank v. Cooper.....	632
First Nat. Bank v. Golder.....	377
Fitzgerald v. Union Stock Yards Co.....	393
Fitzgerald v. Young.....	693
Flesner v. Steinbruck.....	129
Flinn v. Fredrickson.....	563
Forsha v. Nebraska Moline Plow Co.....	770
Freadrich v. State.....	343
Frederick v. Gehling.....	93
Fredrickson, Flinn v.....	563
Fuchs v Chambers.....	538
Furse, State v.....	652
Gate City Malt Co., McGowan v.....	10
Gallatin v. Tri-State Land Co.....	235
Gehling, Frederick v.....	93
Gilliland v. City of Omaha.....	668
Girard Trust Co. v. Dixon.....	557
Goff v. State.....	287
Golder, First Nat. Bank v.....	377
Goodson v. Goodson.....	452
Gordon v. Hennings.....	252
Grand Island Banking Co., Bradstreet v.....	590
Griffin v. Bailey.....	733
Griffin, In re Estate of.....	733
Groeling, Mudra v.....	829
Gunderson, McNamara v.....	112
Gundy v. Nye-Schneider-Fowler Co.....	599
Haases, Lanning v.....	19
Hacker v. Hoover.....	317
Haffke v. Coffin.....	134
Hagedorn v. Maly.....	370
Haines, Russell v.....	650
Hall County, Dunkel v.....	585
Hamilton County v. Aurora Nat. Bank.....	256
Hanks v. State.....	203
Hanna, Miller v.....	224
Hannon, Southern Realty Co. v.....	802
Hansen, Storz Brewing Co. v.....	685
Harper v. Harper.....	269

	PAGE
Harrington v. Hedlund.....	272
Harse v. Ramer.....	680
Hart v. Village of Ainsworth.....	418
Harvey, Martin v.....	173
Hawe v. Higgins.....	575
Hawkins v. Collins.....	140
Hazlett v. Estate of Moore.....	372
Hedlund, Harrington v.....	272
Hellman v. Reitz.....	422
Heink v. Lewis.....	705
Hennings, Gordon v.....	252
Higgins, Hawe v.....	575
Hinrichs, Mauzy v.....	280
Holloway, In re Estate of.....	403
Holloway v. Tillson.....	403
Holt County, State v.....	445
Hoover v. De Klotz.....	146
Hoover, Hacker v.....	317
Howell v. Bowman	389
Howell v. Howell.....	243
Hurn, Everson v.....	716
In re Agnew.....	306
In re Estate of Bush.....	334
In re Estate of Griffin.....	733
In re Estate of Holloway.....	403
In re Estate of Rusch.....	265
In re Estate of Sieker.....	216
In re King.....	298
In re Page.....	299
Insurance Co., Morgenstern v.....	459
Iowa State Traveling Men's Ass'n, Tomson v.....	791
Jay, Clark Implement Co. v.....	759
Justice v. Button.....	367
Justus v. Lincoln Traction Co.....	542
Kairn, Brucker v.....	274
Katz, Muchow v.....	265
Keens, Creighton v.....	637
Keleher v. Kelly.....	127
Kelly, Keleher v.....	127
Kemmerling v. State.....	98
Kent, Curtice Co. v.....	496
Kinder v. Cushman Motor Co.....	619
King, In re.....	298

TABLE OF CASES REPORTED.

xv

	PAGE
Ladies of the Maccabees of the World, Sampson v.....	641
Lamoreaux & Peterson v. Phelan, Shirley & Callahan.....	47
Land, Davison v.....	58
Lanning v. Haases.....	19
Larson v. Chicago & N. W. R. Co.....	247
Latson v. Buck.....	28
Laverick, Bosley v.....	415
Lewis, Heink v.....	705
Lichtensteiger v. State.....	356
Lillie v. Modern Woodmen of America.....	1
Lincoln & N. W. R. Co., Boyd v.....	840
Lincoln Traction Co., Justus v.....	542
Love, State v.....	149
Lund v. Nelson.....	449
McCarthy v. Benedict.....	293
McCoy v. City of Omaha.....	92
McDermott, Stratton v.....	622
McDonald v. Thomas County.....	494
McGowan v. Gate City Malt Co.....	10
McManus v. Burrows.....	250
McNamara v. Gunderson.....	112
Malone, Ætna Indemnity Co. v.....	260
Maly, Hagedorn v.....	370
Mapes v. Bolton.....	815
Martin v. Harvey.....	173
Maurer v. Reifschneider.....	673
Mauzy v. Hinrichs.....	280
Meyer v. Perkins.....	59
Micks, Rossbach v.....	821
Miller v. Hanna.....	224
Miller v. Miller.....	239
Miller v. Worth.....	75
Miner, Spence v.....	610
Modern Woodmen of America, Lillie v.....	1
Monitor Specialty Co., Strauss v.....	176
Moore, Estate of, Hazlett v.....	372
Morgenstern v. Insurance Co.....	459
Muchow v. Katz.....	265
Mudra v. Groeling.....	829
Muller v. Stoecker Cigar Co.....	438
Murdock, Stephenson v.....	818
Murphy, Parish of the Immaculate Conception v.....	524
Nebraska Moline Plow Co. Forsha v.....	770
Nebraska State Railway Commission, Chicago, R. I. & P. R. Co. v.,	853
Nelson, Lund v.....	449

	PAGE
Nixon v. State.....	109
Nocita v. Omaha & Council Bluffs Street R. Co.....	209
Norfolk Nat. Bank, Eiseley v.....	382
Nye-Schneider-Fowler Co., Gundy v.....	599
Old Line Bankers Life Ins Co., Witt v.....	163
Omaha Cattle Loan Co. v. Shelly.....	502
Omaha, City of, Gilliland v.....	668
Omaha, City of, McCoy v.....	92
Omaha Cooperage Co. v. Central States Cooperage Co.....	221
Omaha & Council Bluffs Street R. Co., Nocita v.....	209
Omaha Water Co., State v.....	553
Owen v. Smith.....	596
Page, In re.....	299
Papillion Drainage District, State v.....	808
Parish of the Immaculate Conception v. Murphy.....	524
Perkins, Meyer v.....	59
Perry v. Clark.....	812
Phelan, Shirley & Callahan, Lamoreaux & Peterson v.....	47
Pittenger, Dettman v.....	825
Polenske v. Ennis.....	88
Pritchett v. Collins.....	839
Ramer, Harse v.....	680
Reifschneider, Maurer v.....	673
Reitz, Heilman v.....	422
Rosbach v. Micks.....	821
Roush, Cannell v.....	289
Rusch, In re Estate of.....	265
Russell v. Haines.....	650
Sampson v. Ladies of the Maccabees of the World.....	641
Scheer, Burke v.....	80
School District, Allen v.....	205
Schultz v. State.....	34
Schwind, Deines v.....	122
Sieker, In re Estate of.....	216
Sieker v. Sieker.....	123
Sieker v. Sieker.....	216
Shelly, Omaha Cattle Loan Co. v.....	502
Slama, White v.....	65
Smith v. Coon.....	776
Smith, Owen v.....	596
Southern Realty Co. v. Hannon.....	802
Spence v. Miner.....	610
Staley v. State.....	701
State, Ainlay v.....	721

TABLE OF CASES REPORTED.

xvii

	PAGE
State, Clarence v.....	762
State, Coffman v.....	313
State, Edmondson v.....	797
State, Freadrich v.....	343
State, Goff v.....	287
State, Hanks v.....	203
State, Kemmerling v.....	98
State, Lichtensteiger v.....	356
State, Nixon v.....	109
State, Schultz v.....	34
State, Staley v.....	701
State, Wilson v.....	258
State Bank v. Bradstreet.....	186
State, ex rel. City of Crawford, v. Bispig.....	100
State, ex rel. City of Omaha, v. Omaha Water Co.....	553
State, ex rel. Haberlan, v. Love.....	149
State, ex rel. Hershisser, v. Holt County.....	445
State, ex rel. Hutter, v. Papillion Drainage District.....	808
State, ex rel. Minden-Edison Light & Power Co., v. Dungan.....	738
State, ex rel. Mortensen, v. Furse.....	652
Steinbruck, Flesner v.....	129
Stephenson v. Murdock.....	818
Stoecker Cigar Co., Muller v.....	438
Storz Brewing Co. v. Hansen.....	685
Stratton v. McDermott.....	622
Strauss v. Monitor Specialty Co.....	176
Struble v. Village of DeWitt.....	726
Summers v. Chisholm.....	324
Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.....	660
Swallow v. Eureka Mfg. Co.....	467
Swanson v. Union Stock Yards Co.....	361
Swift, Bill v.....	437
Tate v. Biggs.....	195
Thomas County, McDonald v.....	494
Tillson, Holloway v.....	403
Tomson v. Iowa State Traveling Men's Ass'n.....	791
Tri-State Land Co., Fenton v.....	479
Tri-State Land Co., Gallatin v.....	235
Tyler v. Winder.....	409
Union Stock Yards Co., Fitzgerald v.....	393
Union Stock Yards Co., Swanson v.....	361
Village of Ainsworth, Hart v.....	418
Village of DeWitt, Struble v.....	726
Walden v. Bankers Life Ass'n.....	546

	PAGE
West, Blake v.....	794
Western Fire Ins. Co. v. County Board of Equalization.....	476
Wheeler v. Abbott.....	455
White v. Slama.....	65
Whiteside v. Adams Express Co.....	430
Wilson v. State.....	258
Wilson v. Wilson.....	749
Winder, Tyler v.....	409
Winslow v. Winslow.....	189
Witt v. Old Line Bankers Life Ins. Co.....	163
Woodward v. Woodward.....	142
Worth, Miller v.....	75
Wright, Bolen v.....	116
Young, Fitzgerald v.....	693
Zentmire v. Bralley.....	158

CASES CITED BY THE COURT.

CASES MARKED * ARE DISTINGUISHED IN THIS VOLUME.

	PAGE
Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518.....	151
Adams v. Lawson, 17 Grat. (Va.) 250.....	697
Adams v. State, 65 Ind. 565.....	42
Ætna Life Ins. Co. v. Kaiser, 115 Ky. 539.....	553
Ainsworth v. Roubal, 74 Neb. 723.....	521
Aldritt v. Fleischauer, 74 Neb. 66.....	133, 815
Alexander v. Continental Ins. Co., 67 Wis. 422.....	466
Allen v. Bainbridge, 145 Mich. 366.....	141
Allen v. Cerny, 68 Neb. 211.....	567
Allison v. Taylor & Washburn, 36 Ky. *87.....	617
American Central Ins. Co. v. Hettler, 37 Neb. 849.....	536
American Freehold Land Mortgage Co. v. Whaley, 63 Fed. 743....	692
American Ins. Co. v. Gallatin, 48 Wis. 36.....	466
American Sugar Refining Co. v. Louisiana, 179 U. S. 89.....	353
Anderson v. City of Albion, 64 Neb. 280.....	728
Andrews v. Lindley, 63 Neb. 692.....	819
Anonymous, 13 Ves. Jr. (Eng.) *590.....	616
Arrowsmith v. Arrowsmith, 8 Hun (N. Y.) 606.....	227
Arterburn v. Beard, 86 Neb. 733.....	63
Asbach v. Chicago, B. & Q. R. Co., 74 Ia. 248.....	692
Aspinwall v. Sabin, 22 Neb. 73.....	161
Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110.....	488
Attorney General v. Welsh, 4 Hare (Eng. Ch.) 572.....	530
Austin v. State, 101 Tenn. 563.....	310
Austin v. Tennessee, 179 U. S. 343.....	310
Ayers v. Wolcott, 62 Neb. 805, 66 Neb. 712.....	520
 Baird v. Steadman, 39 Fla. 40.....	 616
Baker v. McDonald, 74 Neb. 595.....	498
Ballou v. Sherwood, 32 Neb. 666.....	128
Bane v. Wick, 19 Ohio, 328.....	427
Bankers Life Ins. Co. v. Robbins, 59 Neb. 170.....	494
Barbier v. Connolly, 113 U. S. 27.....	355
Barker v. Wheeler, 71 Neb. 740.....	254
Barney v. Pinkham, 37 Neb. 664.....	248, 463
Barry v. Wachosky, 57 Neb. 534.....	88
Barstow v. Old Colony R. Co., 143 Mass. 535.....	544
Bassett v. Salisbury Mfg. Co., 43 N. H. 569.....	132

	PAGE
Bates v. Crumbaugh, 114 Ky. 447.....	73
Baumann v. Franse, 37 Neb. 807.....	331
Baynes v. Chastain, 68 Ind. 376.....	62
Beall v. McMenemy, 63 Neb. 70.....	451
Beals v. Lewis, 43 Ohio St. 220.....	119
Beer v. Dalton, 3 Neb. (Unof.) 694.....	797
Bender v. Dietrick, 7 Watts & Serg. (Pa.) 284.....	427
Bennett v. Bennett, 65 Neb. 432.....	191
Bennett v. Camp, 54 Vt. 36.....	227
Bennett v. McDonald, 52 Neb. 278.....	288
Benoit v. Miller, 67 Atl. (R. I.) 87.....	785
Berard v. Atchison & N. R. Co., 79 Neb. 830.....	847
Berry v. Wilcox, 44 Neb. 82.....	69
Berryhill v. Wells, 5 Bin. (Pa.) 56.....	495
Betts v. New Hartford, 25 Conn. *180.....	8
Bias v. United States, 3 Ind. Ter. 27.....	42
Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co., 94 Minn. 269..	665
Biddle's Estate, 28 Pa. St. 59.....	427
Billings v. German Ins. Co., 34 Neb. 502.....	464
Bingham v. Broadwell, 73 Neb. 605.....	73
Bissell v. Lewis, 4 Mich. 450.....	188
Black v. Pate, 130 Ala. 514.....	71
Blinn v. Chessman, 49 Minn. 140.....	625
Blood v. Spaulding, 57 Vt. 422.....	62
Bloomfield v. Pinn, 84 Neb. 472.....	694
Bloss v. Plymale, 3 W. Va. 393.....	400
Bohanan v. State, 18 Neb. 57.....	766
Boldt v. Budwig, 19 Neb. 739.....	698
Bonacum v. Harrington, 65 Neb. 831.....	528
Bourke v. Boone, 94 Md. 472.....	427
Bradbury v. Vandalia Levee and Drainage District, 236 Ill. 36....	812
Brawshaw v. Perdue, 12 Ga. 510.....	697
Brennan v. Clark, 29 Neb. 385.....	138
Brown v. District of Columbia, 29 D. C. App. 273.....	152
Brunnenmeyer v. Buhre, 32 Ill. 183.....	530
Buckner v. Charleston & S. R. Co., 7 S. Car. 325.....	252
Bullard & Hoagland v. Chaffee, 61 Neb. 83.....	536
Burleigh v. Palmer, 74 Neb. 122.....	160, 376
Burlington & M. R. R. Co. v. Koonce, 34 Neb. 479.....	810, 856
Burwell & Ord Irrigation & Power Co. v. Wilson, 57 Neb. 396....	166
Butler v. Smith, 84 Neb. 78.....	624, 630
Calvert v. State, 34 Neb. 616.....	745
Camfield v. United States, 167 U. S. 518.....	355
Campbell v. Kimball, 87 Neb. 309.....	16
Canal Co. v. Gordon, 6 Wall. (U. S.) 561.....	487
Candee v. Lord, 2 Comst. (N. Y.) 269.....	522

TABLE OF CASES CITED.

xxi

	PAGE
Carey v. Bilby, 129 Fed. 203.....	400
Carpenter v. Manhattan Life Ins. Co., 22 Hun (N. Y.) 49.....	499
Carroll v. Greenwich Ins. Co., 199 U. S. 401.....	348
Cass County v. Sarpy County, 63 Neb. 813.....	659
Castle Rock Irrigation Canal & Water Power Co. v. Jurisch, 67 Neb. 377.....	492
Cedar County v. Goetz, 3 Neb. (Unof.) 172.....	327
Central of Georgia R. Co. v. Wright, 207 U. S. 127.....	472
Chadron Building & Loan Ass'n v. O'Linn, 1 Neb. (Unof.) 1.....	838
Chapman v. State, 61 Neb. 888.....	288
Cheney v. Dunlap, 27 Neb. 401.....	119
Chicago & A. R. Co. v. Utley, 38 Ill. 410.....	249
Chicago, B. & Q. R. Co. v. First Nat. Bank, 58 Neb. 548.....	330
Chicago, B. & Q. R. Co. v. Howard, 45 Neb. 570.....	544
*Chicago, B. & Q. R. Co. v. Mitchell, 74 Neb. 563.....	847
Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629.....	536
Chicago, R. I. & P. R. Co. v. Buckstaff, 65 Neb. 334.....	149
Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380.....	818
Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710.....	535
Chicago, St. P., M. & O. R. Co. v. McManigal, 73 Neb. 580.....	774
Church v. Church, 16 R. I. 667.....	755
Cimarron Land Co v. Barton, 51 Kan. 554.....	138
Citizens State Bank v. Porter, 4 Neb. (Unof.) 73.....	523
City of Aurora v. Cox, 43 Neb. 727.....	728
City of Beatrice v. Reid, 41 Neb. 214.....	728
City of Chadron v. Dawes County, 82 Neb. 614.....	106
City of Chicago v. Babcock, 143 Ill. 358.....	401
City of Chicago v. Bixby, 84 Ill. 82.....	673
City of Chicago v. Witt, 75 Ill. 211.....	678
City of Crawford v. Darrow, 87 Neb. 494.....	102
City of Lincoln v. Smith, 28 Neb. 762.....	728
City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579	487
City of Wahoo v. Nethaway, 73 Neb. 54.....	420
Clague v. Tri-State Land Co., 84 Neb. 499.....	484
Clark v. Clark, 21 Neb. 402.....	331
Clark v. Sayre, 122 Ia. 591.....	375
Cleland v. Anderson, 66 Neb. 252.....	776
Cleveland v. City Council, 102 Ga. 233.....	811
Close v. Cooper, 34 Ohio St. 98.....	148
Cloud v. Webb, 4 Dev. (N. Car.) 290.....	451
Coates v. Wallace, 17 Serg. & Rawle (Pa.) 75.....	25
Cobbey v. Burks, 11 Neb. 157.....	24
Coffman v. Campbell & Co., 87 Ill. 98.....	188
Colby v. Parker, 34 Neb. 510.....	120
Cole v. Mordaunt, 4 Ves. Jr. (Eng.) *196.....	677

	PAGE
• Commissioners of Highways v. Commissioners of Lake Fork Special Drainage District, 246 Ill. 388.....	812
Commissioners of Union Drainage District v. Commissioners of Highways, 220 Ill. 176.....	811
Commonwealth v. Barker, 211 Pa. St. 610.....	154
Commonwealth v. Walton, 182 Pa. St. 373.....	154
Commonwealth Mut. Fire Ins. Co. v. Hayden Bros., 60 Neb. 636....	139
Cones v. Brooks, 60 Neb. 698.....	160
Conn v. Chicago, B. & Q. R. Co., 88 Neb. 732.....	132
Connolly v. Union Sewer Pipe Co., 184 U. S. 540.....	349
Cook v. Marshall County, 196 U. S. 261.....	354
Cook v. Walton, 38 Ind. 228.....	412
Cordson v. State, 77 Neb. 416.....	287
Corey v. Burton, 32 Mich. 30.....	498
Cowherd v. Kitchen, 57 Neb. 426.....	467
Cox v. Royal Tribe, 42 Or. 365.....	553
Cox v. Texas, 202 U. S. 446.....	353
Crane v. Doty, 1 Ohio St. 279.....	427
Cropsey v. Wiggenhorn, 3 Neb. 108.....	1
Crowell v. Galloway, 3 Neb. 215.....	4
Croy v. Obion County, 104 Tenn. 525.....	310
Cummings v. Hyatt, 54 Neb. 35.....	492
Cunningham v. City of Seattle, 40 Wash. 59.....	152
Cutler v. Meeker, 71 Neb. 732.....	331
 Danville Democrat Publishing Co. v. McClure, 86 Ill. App. 432.....	 698
Darst v. Backus, 18 Neb. 231.....	120
Davis v. Commissioners of Boone County, 28 Neb. 837.....	828
Davis v. Davis, 62 Ohio St. 411.....	427
Davis v. First Nat. Bank, 5 Neb. 242.....	410
Davis v. Gillett, 52 N. H. 126.....	138
Derby v. Weyrich, 8 Neb. 174.....	330
Detwiler v. Detwiler, 30 Neb. 338.....	330
Devereaux v. Henry, 16 Neb. 55.....	560
De Yampert v. Brown & Johnson, 28 Ark. 166.....	678
Dixon County v. Halstead, 23 Neb. 697.....	472
Dorr v. Simmerson, 127 Ia. 551.....	814
Dorsey v. Wellman, 85 Neb. 262.....	59, 174, 393
Dougherty v. Hughes, 165 Ill. 384.....	614
Downing v. Bain, 24 Ga. 372.....	427
Drainage District No. 1 v. Richardson County, 86 Neb. 355.....	234
Drais v. Hogan, 50 Cal. 121.....	412
Draper v. Clayton, 87 Neb. 443.....	680
Driscoll v. Towle, 181 Mass. 416.....	776
Dundas v. Chrisman, 25 Neb. 495.....	334
Durham v. Hadley, 47 Kan. 73.....	369
Duvale v. Duvale, 54 N. J. Eq. 581.....	145

TABLE OF CASES CITED.

xxiii

	PAGE
Eaton v. Hasty, 6 Neb. 419.....	494
Eiseman v. Gallagher, 24 Neb. 79.....	121
Elberson v. Richards, 42 N. J. Law, 69.....	630
Eldred v. Eldred, 62 Neb. 613.....	267
Elliott v. Atkins, 26 Neb. 403.....	162
Ellison v. Ellison, 65 Neb. 412.....	242
El Paso & S. W. R. Co. v. Darr, 93 S. W. (Tex Civ. App.) 166....	400
Elting v. Gould, 96 Mo. 535.....	626
Ely v. Wilcox, 20 Wis. *523.....	678
Emery v. Klipp, 154 Cal. 83.....	626
Enewold v. Olsen, 39 Neb. 59.....	116, 624
Englebert v. Troxell, 40 Neb. 195.....	498
Estabrook v. Omaha Hotel Co., 5 Neb. 76.....	166
Fagan v. Hook, 134 Ia. 381.....	139, 369
Farak v. First Nat. Bank, 67 Neb. 468.....	494
Farmers Bank v. Boyd, 67 Neb. 497.....	410
Farmers Canal Co. v. Frank, 72 Neb. 136.....	492
Farmers H. L. C. & R. Co. v. New Hampshire Real Estate Co., 40 Colo. 467.....	492
Farmers Loan & Trust Co. v. Denver, L. & G. R. Co., 60 C. C. A. 588	369
Faulkner v. Gilbert, 57 Neb. 544.....	806
Feliz v. Feliz, 105 Cal. 1.....	451
Ferguson v. Kumler, 11 Minn. 62.....	522
Fike v. Ott, 76 Neb. 439.....	721
Firemen's Benevolent Ass'n v. Lounsbury, 21 Ill. 510.....	152
First Nat. Bank v. Pilger, 78 Neb. 169.....	678
First Nat. Bank v. Tighe, 49 Neb. 299.....	145
First Reformed Presbyterian Church v. Bowden, 14 Abb. N. Cas. (N. Y.) 356.....	531
Fitch v. Martin, 84 Neb. 745.....	334
Fjone v. Fjone, 16 N. Dak. 100.....	323
Flesner v. Steinbruck, 89 Neb. 129.....	815
Flinn v. State, 24 Ind. 286.....	42
Foley v. Holtry, 43 Neb. 133.....	274
Ford v. State, 71 Neb. 246.....	42
Fosbinder v. Svitak, 16 Neb. 499.....	148
Foss v. Smith, 76 Vt. 113.....	148
Foster v. Bowles, 138 Cal. 346.....	562
Fowler v. McKay, 88 Neb. 387.....	165
Franklin County v. Wilt & Polly, 87 Neb. 132.....	811
Frederick v. Gray, 10 Serg. & Rawle (Pa.) 182.....	451
Fremont, E. & M. V. R. Co. v. Crum, 30 Neb. 70.....	847
Fremont, E. & M. V. R. Co. v. Harlin, 50 Neb. 698.....	847
Fremont, E. & M. V. R. Co. v. Marley, 25 Neb. 138.....	372

	PAGE
Fremont, E. & M. V. R. Co. v. Mattheis, 39 Neb. 98.....	828
Fresno Canal & Irrigation Co. v. Park, 129 Cal. 437.....	488
Garber v. Gianella, 98 Cal. 527.....	678
Gauvreau v. Van Patten, 83 Neb. 64.....	73
German-American Fire Ins. Co. v. Minden, 51 Neb. 870.....	151
Germania Life Ins. Co. v. Lewin, 24 Colo. 43.....	553
Gerner v. Yates, 61 Neb. 100.....	774
Gibson v. Hammang, 63 Neb. 349.....	191, 321
Gibson v. Parlin & Orindorff, 13 Neb. 292.....	166
Gilbert v. Finch, 173 N. Y. 455.....	400
Gillespie v. City of Lincoln, 35 Neb. 34.....	152
Gillilan v. McDowall, 66 Neb. 814.....	115, 624
Gillilan v. Rollins, 41 Neb. 540.....	138
Gindrat v. Western R. of Ala., 96 Ala. 162.....	678
Gist, Ex'r, v. Hanly, 33 Ark. 233.....	161
Godde v. Marvin, 142 Mich. 518.....	615
Godfrey v. Smith, 73 Neb. 756.....	677
Gordon v. City of Omaha, 77 Neb. 556.....	253
Gottlieb v. Thatcher, 34 Fed. 435.....	523
Grand Island Banking Co. v. Wright, 53 Neb. 574.....	410
Grand Valley Irrigation Co. v. Leshar, 28 Colo. 273.....	488
Green v. Des Moines Fire Ins. Co., 84 Ia. 135.....	466
Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 130 Ia. 123....	665
Gregory v. Hartley, 6 Neb. 356.....	410
Griffith v. Anchor Fire Ins. Co., 143 Ia. 88.....	466
Griffith v. Bonawitz, 73 Neb. 622.....	73
Grotenkemper v. Harris, 25 Ohio St. 510.....	737
Grove-Wharton Construction Co. v. Clarke, 86 Neb. 831.....	14
Grymes v. Sanders, 93 U. S. 55.....	56
Guyer v. Stratton, 29 Conn. 421.....	62
Haas v. St. Louis & S. R. Co., 111 Mo. App. 706.....	215
Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624.....	721
Hadacheck v. Chicago, B. & Q. R. Co., 74 Neb. 385.....	536
Hahn v. Bonacum, 76 Neb. 837.....	14
Hale v. Allinson, 102 Fed. 790.....	86
Hale v. Young, 24 Neb. 464.....	684
Haley v. State, 42 Neb. 556.....	310
Hall v. Hall, 8 Vt. 156.....	495
Halter v. Nebraska, 205 U. S. 34.....	354
Hancock & Walters v. Stout, 28 Neb. 301.....	149
Hankins, Adm'r, v. Kimball, 57 Ind. 42.....	252
Hapgood Plow Co. v. Martin, 16 Neb. 27.....	590
Haralson v. Redd, 15 Ga. 148.....	427
Harding v. St. Louis Nat. Stock Yards, 242 Ill. 444.....	776
Hardinger v. Modern Brotherhood of America, 72 Neb. 869.....	547

TABLE OF CASES CITED.

XXV

	PAGE
Hargrave v. Hall, 3 Ariz. 252.....	489
Harms v. Freytag, 59 Neb. 359.....	561
Harris v. Phoenix Ins. Co., 85 Ia. 238.....	464
Hartford Fire Ins. Co. v. Landfare, 63 Neb. 559.....	464
Hartwig v. Gordon, 37 Neb. 657.....	149
Hauber v. Leibold, 76 Neb. 706.....	149
Haverly v. State Line & S. R. Co., 135 Pa. St. 50.....	141
Hayden v. Woods, 16 Neb. 306.....	776
Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 238.....	348
Heffner v. Cass and Morgan Counties, 193 Ill. 439.....	811
Heist v. Heist, 48 Neb. 794.....	573
Helming v. Forrester, 87 Neb. 438.....	678
Helwig v. Aulabaugh, 83 Neb. 542.....	463
Henry v. Henry, 73 Neb. 752.....	369
Henry v. Jones, 28 Ala. 385.....	62
Herbage v. McKee, 82 Neb. 354.....	624
Hespen v. Union P. R. Co., 82 Neb. 495.....	142
Hitchcock v. Hitchcock, 35 Pa. St. 393.....	427
Hoehne v. Breitzkreitz, 5 Neb. 110.....	330
Hogue v. Capital Nat. Bank, 47 Neb. 929.....	635
Hollis v. State Ins. Co., 65 Ia. 454.....	464
Home Ins. Co. v. Duke, 43 Ind. 418.....	167
Home Telephone Co. v. Fields, 150 Ala. 306.....	400
Hooper v. Castetter, 45 Neb. 67.....	687
Horbach v. Tyrrell, 48 Neb. 514.....	838
Horton v. State, 60 Neb. 701.....	472
Houston & T. C. R. Co. v. Ryan, 44 Tex. 426.....	257
Howard v. Skinner, 87 Md. 556.....	70
Hoye v. Diehls, 78 Neb. 77.....	828
Hunt v. McClanahan, 1 Helsk. (Tenn.) 503.....	161
Hurst v. Von De Veld, 158 Mo. 239.....	427
Husenetter v. Gullikson, 55 Neb. 32.....	166
Iddings v. Citizens State Bank, 3 Neb. (Unof.) 750.....	398
Illinois C. R. Co. v. Barron, 5 Wall. (U. S.) 91.....	737
Ingersoll v. Harrison, 48 Mich. 234.....	616
Inman v. Mead, 97 Mass. 310.....	523
In re Claim of Bueker v. Estate of Korff, 5 Neb. (Unof.) 194.....	561
In re Estate of Brusha, 87 Neb. 254.....	220
In re Estate of Bullion, 87 Neb. 700.....	340
In re Estate of Hentges, 86 Neb. 75.....	376
In re Harmon, 43 Fed. 372.....	310
In re Railroad Commissioners, 15 Neb. 679.....	656
Irwin v. Judge, 81 Conn. 492.....	42
Irwin v. Nixon's Heirs, 11 Pa. St. 419.....	494
Iseley v. Lovejoy, 8 Blackf. (Ind.) *462.....	698
Ivins v. Ackerson, 38 N. J. Law, 220.....	62

	PAGE
Jacobson v. Van Boening, 48 Neb. 80.....	372, 568
Jarrett v. Hoover, 54 Neb. 65.....	820
Jobst v. Hayden Bros., 84 Neb. 735.....	16
Johns v. State, 88 Neb. 145.....	111
Johnson v. Butt, 46 Neb. 220.....	797
Johnson v. Emerick, 74 Neb. 303.....	270
Johnson v. Pomeroy, 31 Ohio St. 247.....	617
Johnstone v. Fritz, 159 Pa. St. 378.....	613
Jones v. State, 49 Neb. 609.....	259
Jones v. Valentine's School of Telegraphy, 122 Wis. 318.....	498
Kansas City & O. R. Co. v. Rogers, 48 Neb. 653.....	847
Kelley v. Seay, 3 Okla. 527.....	138
Kimmell v. State, 104 Tenn. 184.....	310
Kleckner v. Turk, 45 Neb. 176.....	521, 635
Knowles v. Brown, 69 Ia. 11.....	451
Knox v. Williams, 24 Neb. 630.....	120
Kobarg v. Greeder, 51 Neb. 365.....	330
Kocher v. Cornell, 59 Neb. 315.....	410, 413, 730
Krippner v. Biebl, 28 Minn. 139.....	141
Krueger v. Jenkins, 59 Neb. 641.....	420
Kruse v. Johnson, 87 Neb. 694.....	167
Kyd v. Gage County, 38 Neb. 131.....	589
Ladd v. Brockton Street R. Co., 180 Mass. 454.....	544
Laing v. Nelson, 40 Neb. 252.....	700
Lambert v. Alcorn, 144 Ill. 313.....	815
Lanata v. Planas, 2 La. Ann. 544.....	523
Lang v. Merwin, 99 Me. 486.....	442
Lanham v. Bowlby, 79 Neb. 39.....	797
Laraway v. Larue, 63 Ia. 407.....	451
Larson v. Anderson, 74 Neb. 361.....	678
Lee v. Carroll Normal School Co., 1 Neb. (Unof.) 681.....	138
Leese v. Courler Publishing & Printing Co., 75 Neb. 391.....	25
Lefavour v. Homan, 3 Allen (Mass.) 354.....	451
Leigh v. Savidge, 14 N. J. Eq. 124.....	427
Leisenberg v. State, 60 Neb. 628.....	288
Leishman v. Union Iron Works, 148 Cal. 274.....	609
Leonard v. Green, 34 Minn. 137.....	145
Lewis v. White, 16 Ohio St. 444.....	370
Lewon v. Heath, 53 Neb. 707.....	252
Lincoln Street R. Co. v. City of Lincoln, 61 Neb. 109.....	151
Lindley v. Horton, 27 Conn. *58.....	698
Livesey v. Omaha Hotel Co., 5 Neb. 50.....	166
Lodge v. Patterson, 3 Watts (Pa.) 74.....	451
Logan County v. Carnahan, 66 Neb. 685.....	631
Long v. Dollarhide, 24 Cal. 218.....	678

TABLE OF CASES CITED.

xxvii

	PAGE
Long v. State, 17 Neb. 60.....	103
Lopez v. Campbell, 163 N. Y. 340.....	692
Losey v. Simpson, 11 N. J., Eq. 246.....	678
Louisville & Evansville Mail Co. v. Barnes' Adm'r, 117 Ky. 860....	400
Love v. Merrill, 130 N. W. (Mich.) 1123.....	617
Lovejoy v. Murray, 70 U. S. 1.....	398
Low v. Reese Printing Co., 41 Neb. 127.....	349
Lowenstein v. Phelan, 17 Neb. 429.....	293
Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501.....	126
Luick v. Driscoll, 13 Ind. App. 279.....	697
Lyons v. Carr, 77 Neb. 883.....	128
McCabe v. Britton, 79 Ind. 225.....	412
McCabe v. Equitable Land Co., 88 Neb. 453.....	624
McCall v. Whaley, 52 Tex. Civ. App. 646.....	443
McCoy v. Lane, 66 Neb. 847.....	376
McDonald v. Aufdengarten, 41 Neb. 40.....	120
McDonald v. McDonald, 155 Cal. 665.....	242
McDowell v. First Nat. Bank, 73 Neb. 307.....	340
McElroy v. People, 202 Ill. 473.....	801
McFaddin v. Preston, 54 Tex. 403.....	257
McFarland v. Flack, 87 Neb. 452.....	678
McFern v. Gardner, 121 Mo. App. 1.....	784
McGillin v. Gleason, 34 Neb. 694.....	684
McGregor v. Cone, 104 Ia. 465.....	310
McKee v. Hunt, 142 Cal. 526.....	614
McLaughlin v. Schnellbacher, 65 Ill. App. 50.....	697
McNamara v. Gunderson, 89 Neb. 112.....	624
McQuiggan v. Ladd, 79 Vt. 90.....	148
McReady v. Rogers, 1 Neb. 124.....	287, 398
Mahon v. Leech, 11 N. Dak. 181.....	126
Malone v. Dobbins, 23 Pa. St. 296.....	427
Manteufel v. Wetzol, 133 Wis. 619.....	133
Markey v. School District, 58 Neb. 479.....	167
Marshall v. Piggott, 78 Neb. 722.....	342
Martin v. Harvey, 89 Neb. 173.....	393
Mathews v. Hedlund, 82 Neb. 825.....	852
Matson v. Emerson, 2 Neb. (Unof.) 190.....	468
Maxwell v. Gregory, 53 Neb. 5.....	369
May v. New Orleans, 178 U. S. 496.....	310
Mayer v. State, 52 Neb. 764.....	105
Mead v. Inhabitants of Acton, 139 Mass. 341.....	156
Mehaffy v. Dobbs, 9 Watts (Pa.) 363.....	451
Merriam v. Gordon, 17 Neb. 325.....	162
Meyer v. Madreperla, 68 N. J. Law, 258.....	369
Meyer v. Michaels, 69 Neb. 138.....	567

	PAGE
Miller v. City of St. Paul, 38 Minn. 134.....	673
Miller v. Estate of Miller, 69 Neb. 441.....	219
Miller v. Gable, 2 Denio (N. Y.) 492.....	530
Miller v. Hirsch, 110 La. 259.....	427
Miller v. Miller, 64 Me. 484.....	269
Millsaps v. Louisville, N. O. & T. R. Co., 69 Miss. 423.....	544
Missouri P. R. Co. v. Cass County, 76 Neb. 396.....	811, 856
Missouri P. R. Co. v. Humes, 115 U. S. 512.....	355
Missouri P. R. Co. v. Lyons, 54 Neb. 633.....	545
Moffett v. Moffett, 67 Tex. 642.....	677
Moore v. Williams, 115 N. Y. 586.....	369
Morgan v. Bergen, 3 Neb. 209.....	165
Morgan v. Lewiston, 91 Me. 566.....	673
Morgan v. Schusselle, 228 Ill. 106.....	812
Morris v. Miller, 83 Neb. 218.....	148
Morrison v. State, 88 Neb. 682.....	263
Morse v. Chicago, B. & Q. R. Co., 81 Neb. 745.....	847
Morse v. Gilman, 16 Wis. *504.....	172
Mt. Zion Baptist Church v. Whitmore, 83 Ia. 138.....	531
Mullarky v. Sullivan, 136 N. Y. 227.....	427
Mullin v. Central R. Co., 77 N. J. Law, 241.....	364
Munk v. Frink, 75 Neb. 172, 81 Neb. 631.....	852
Murphey v. State, 43 Neb. 34.....	288
Myers v. Myers, 88 Neb. 656.....	239
Nagel v. Nagel, 12 Mo. 53.....	749
National Mutual Building & Loan Ass'n v. Retzman, 69 Neb. 667..	119
Navailles v. Dielmann, 124 La. 421.....	785
Nebraska Hardware Co. v. Humphrey Hardware Co., 81 Neb. 693..	223
Nebraska Nat. Bank v. Johnson, 51 Neb. 546.....	263
Nebraska Plumbing Supply Co. v. Payne, 84 Neb. 390.....	14
Nelson v. Wickham, 86 Neb. 46.....	191
Nelson v. Wirthlele, 88 Neb. 595.....	372
Newlean & Hoard v. Olson, 22 Neb. 717.....	566
Newton v. Porter, 5 Lans. (N. Y.) 416.....	263
Nicholas v. Iowa Merchants Mutual Ins. Co., 125 Ia. 262.....	466
Nilson v. Chicago, B. & Q. R. Co., 84 Neb. 595.....	366
Noble State Bank v. Haskell, 219 U. S. 104.....	354
Nolan v. Garrison, 156 Mich. 397.....	615
Northwall Co. v. Osgood, 80 Neb. 764.....	410
Oakley v. Pegler, 30 Neb. 628.....	627
Obe v. Pattat, 130 N. W. (Ia.) 903.....	815
Olcott v. Bolton, 50 Neb. 779.....	278
Oliver v. Lansing, 57 Neb. 352.....	270
Omaha Bridge & Terminal R. Co. v. Reed, 69 Neb. 514.....	251
Omaha Street R. Co. v. Martin, 48 Neb. 65.....	209
Orcutt v. Pasadena Land & Water Co., 152 Cal. 599.....	487

TABLE OF CASES CITED.

xxix

	PAGE
O'Shea v. New York, C. & St. L. R. Co., 105 Fed. 559.....	400
Otis v. Parker, 187 U. S. 606.....	348
Ottow v. Friese, 126 N. W. (N. Dak.) 503.....	126
Owen v. Chicago, B. & Q. R. Co., 86 Neb. 851.....	827
Oxnard Beet Sugar Co. v. State, 73 Neb. 66.....	153
Palmer v. Mizner, 2 Neb. (Unof.) 899.....	678
Palmer v. Mizner, 70 Neb. 200.....	188
Palmer v. State, 70 Neb. 136.....	264
Parks Bros. & Co. v. Nez Perce County, 13 Idaho, 298.....	310
Parrat v. Nelligh, 7 Neb. 456.....	820
Passumpsic Savings Bank v. Maulick, 60 Neb. 469.....	820
Pease v. Pease, 72 Wis. 136.....	755
Peck v. Herrington, 109 Ill. 611.....	815
Peckham v. Stewart, 97 Cal. 147.....	369
Pendleton v. Larrabee, 62 Conn. 393.....	427
Penn v. Trompen, 72 Neb. 273.....	518
People v. Teague, 106 N. Car. 576.....	70
People v. Weed, 29 Hun (N. Y.) 628.....	703
People's Building, Loan & Savings Ass'n v. Pickard, 2 Neb. (Unof.) 144	119
Perkins v. McDowell, 3 Wyo. 328.....	627
Perkins v. Mathes, 49 N. H. 107.....	339
Perrine v. Knights Templar's & Masons' Life Indemnity Co., 71 Neb. 267, 273.....	1
Persons v. McDonald, 60 Neb. 452.....	165
Persons v. Persons, 25 N. J. Eq. 250.....	145
Peterson v. Andrews, 88 Neb. 136.....	334
Pfister v. Sentinel Co., 108 Wis. 572.....	172
Phœnix Assurance Co. v. Fire Department, 117 Ala. 631.....	152
Phœnix Ins. Co. v. Kerr, 129 Fed. 723.....	174, 393
Phœnix Ins. Co. v. Readinger, 28 Neb. 587.....	327
Pinkerton v. Missouri P. R. Co., 117 Mo. App. 288.....	665
Platte Land Co. v. Hubbard, 12 Colo. App. 465.....	369
Pleasants, Adm'r, v. Kortrecht, 5 Heisk. (Tenn.) 694.....	161
Pledger v. Chicago, B. & Q. R. Co., 69 Neb. 456.....	552
Plummer v. Rummel, 26 Neb. 142.....	518
Pollock v. Horn, 13 Wash. 626.....	617
*Pomerene Co. v. White, 70 Neb. 177.....	729
Potter v. Ajax Mining Co., 19 Utah, 421.....	161
Pounder v. Ashe, 44 Neb. 672.....	528
Powell v. Pennsylvania, 127 U. S. 678.....	355
Powell's Adm'r v. Powell, 84 Va. 415.....	737
Prest v. Black, 63 Kan. 682.....	678
Pribbeno v. Chicago, B. & Q. R. Co., 81 Neb. 657.....	847
Price v. Conway, 134 Pa. St. 340.....	698
Prince v. Hazleton, 20 Johns. (N. Y.) 502.....	677
Prudential Real Estate Co. v. Hall, 79 Neb. 808.....	230

	PAGE
Reading v. Reading, 5 Atl. (N. J. Ch.) 721.....	755
Rcdell v. Moores, 63 Neb. 219.....	153
Redman v. Voss, 46 Neb. 512.....	287
Reed v. Continental Ins. Co., 6 Pennewill (Del.) 204.....	464
Republic Life Ins. Co. v. Swigert, 135 Ill. 150.....	86
Rexroth v. Schein, 206 Ill. 80.....	71
Reymann Brewing Co. v. Brister, 179 U. S. 445,.....	353
Reynolds v. Hosmer, 51 Cal. 205.....	487
Rice & Gorum v. Day, 33 Neb. 204.....	161
Richardson v. Richardson, 45 Ill. App. 362.....	716
Richardson v. Warner, 28 Fed. 343.....	295
Riley v. Lidtke, 49 Neb. 139.....	730
Roberts v. Sampson, 50 Neb. 745.....	172
Robertson v. Trammell, 37 Tex. Civ. App. 53.....	400
Robinson v. City of Omaha, 84 Neb. 642.....	247, 673
Rolfe v. Pilloud, 16 Neb. 21.....	561
Roscerans v. Asay, 49 Neb. 512.....	695
Roshi's Appeal, 69 Pa. St. 462.....	531
Ruthven Bros. v. American Fire Ins. Co., 92 Ia. 316.....	466
St. John v. New York, 201 U. S. 633.....	352
St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448.....	725
St. Vincent's Parish v. Murphy, 83 Neb. 630.....	524
Sammons v. Kearney Power & Irrigation Co., 77 Neb. 580.....	490
San Diego Flume Co. v. Souther, 90 Fed. 164.....	488
Sanford v. Craig, 52 Neb. 483.....	248, 463
Sapp v. Roberts, 18 Neb. 299.....	64
Sawyer v. White, 122 Fed. 223.....	323
Scarborough v. Myrick, 47 Neb. 794.....	627
Schauber v. Jackson, 2 Wend. (N. Y.) 13.....	427
Schley v. Horan, 82 Neb. 704.....	323
Schmuck v. Hill, 2 Neb. (Unof.) 79.....	699
Schrandt v. Young, 62 Neb. 254.....	497
Schribar v. Platt, 19 Neb. 631.....	331
Schultz v. State, 88 Neb. 613.....	314
Scott v. Flowers, 60 Neb. 675.....	776
Scott v. Indianapolis Wagon Works, 48 Ind. 75.....	522
Segear v. Westcott, 83 Neb. 515.....	59
Seibly v. Person, 105 Mich. 584.....	269
Sensenderfer v. Kemp, 83 Mo. 581.....	678
Shellabarger v. Chicago, R. I. & P. R. Co., 66 Ia. 18.....	249
Sherman v. Clark, 4 Nev. 138.....	533
Shippy v. Village of Au Sable, 65 Mich. 494.....	673
Sickler v. Mannix, 68 Neb. 21.....	8
Simeone v. Lindsay, 6 Pennewill (Del.) 224.....	783
Singer Mfg. Co. v. Fleming, 39 Neb. 679.....	536
Skelton v. Sackett, 91 Mo. 377.....	626

TABLE OF CASES CITED.

xxxii

	PAGE
Slavers, The, 2 Wall. (U. S.) 383.....	70
*Smith v. Chicago, B. & Q. R. Co., 81 Neb. 186.....	847
Smith v. Fife, 2 Neb. 10.....	499
Smith v. Hitchcock, 38 Neb. 104.....	797
Smith v. Home Ins. Co., 47 Hun (N. Y.) 30.....	464
Smith v. Johnson, 57 Ohio St. 486.....	86
Smith v. Meyers, 52 Neb. 70.....	458
Smith v. State, 54 Ark. 248.....	310
Smithsonian Institution v. Meech, 169 U. S. 398.....	145
Snell v. Rue, 72 Neb. 571.....	494
Snyder's Estate, 217 Pa. St. 71.....	339
Soon Hing v. Crowley, 113 U. S. 703.....	355
Sorenson v. Sorenson, 189 Ill. 179.....	70
Spler v. Schappel, 86 Neb. 335.....	126
Spurgin v. Thompson, 37 Neb. 39.....	73
Spurlock v. Noe, 39 L. R. A. 779.....	618
Squires v. Elwood, 33 Neb. 126.....	138
Staley v. State, 87 Neb. 539.....	702
Standard Oil Co. v. State, 117 Tenn. 618.....	312
Standiford v. Green & Co., 54 Neb. 10.....	584
Stanislaus Water Co. v. Bachman, 152 Cal. 716.....	489
State v. Baker, 62 Neb. 840.....	742
State v. Campbell, 82 Conn. 671.....	39
State v. Chicago, B. & Q. R. Co., 29 Neb. 412.....	810, 856
State v. Chicago, St. P., M. & O. R. Co., 19 Neb. 476.....	103
State v. Farmers & Merchants Irrigation Co., 59 Neb. 1.....	811
State v. Goodenow, 65 Me. 30.....	703
State v. Graves, 82 Neb. 282.....	741
State v. Hand, 87 Neb. 189.....	702
State v. Lancaster County, 6 Neb. 474.....	312
State v. Lancaster County, 17 Neb. 85.....	312
State v. Moore, 104 N. Car. 714.....	348
State v. Moores, 55 Neb. 480.....	151
State v. Omaha Elevator Co., 75 Neb. 637.....	348
State v. Rankin, 33 Neb. 266.....	657
State v. Russell, 34 Neb. 116.....	73
State v. Sherwood, 68 Vt. 414.....	703
State v. Stanton, 37 Conn. 421.....	42
State v. Stentz, 33 Wash. 444.....	40
State v. Walker, 30 Neb. 501.....	657
State v. Watson, 216 Mo. 420.....	37, 42
State v. Wheeler, 33 Neb. 563.....	151
State v. Ziegenhein, 144 Mo. 283.....	154
State Bank v. Bradstreet, 89 Neb. 186.....	437
Steinkraus v. Korth, 44 Neb. 777.....	518
Stevens v. Howe, 28 Neb. 547.....	609

	PAGE
Stewart v. Ross, 50 Miss. 776.....	227
Stover v. Flower, 120 Ia. 514.....	442
Strong v. Lawrence, 58 Ia. 55.....	522
Stuart v. Palmer, 74 N. Y. 183.....	472
Sturgis v. Sturgis, 51 Or. 10.....	614
Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642.....	138
Swanger v. Porter, 87 Neb. 764.....	486
Sweet v. State, 75 Neb. 263.....	764
Swihart v. Shaum, 24 Ohio St. 432.....	522
Tate v. Biggs, 89 Neb. 195.....	238
Tayloe v. Sandiford, 7 Wheat. (U. S.) *13.....	138
Taylor v. Insley, 7 Colo. App. 175.....	627
Taylor v. Stull, 79 Neb. 295.....	160
Taylor v. Williams, 26 Tex. 583.....	257
Teager v. Flemingsburg, 109 Ky. 746.....	673
Territory v. Jones, 14 N. M. 579.....	442
Thomas v. Garvan, 4 Dev. (N. Car.) 223.....	451
Thompson v. Chicago, B. & Q. R. Co., 84 Neb. 4.....	847
Thompson v. Kessel, 30 N. Y. 383.....	498
Thompson v. State, 131 Ala. 18.....	42
Thompson v. State, 6 Neb. 102.....	264
Thornhill v. Hargreaves, 76 Neb. 582.....	495
Tootle v. First Nat. Bank, 34 Neb. 863.....	498
Tootle-Weakley Millinery Co. v. Billingsley, 74 Neb. 531.....	688
Totten v. Sun Printing & Publishing Ass'n, 109 Fed. 289.....	698
Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490.....	499
Town of Cenewango v. Shaw, 52 N. Y. Supp. 327.....	811
Traphagen v. Irwin, 18 Neb. 195.....	678
Travelers Ins. Co. v. McConkey, 127 U. S. 661.....	547
Treadway v. S. C. & St. P. R. Co., 40 Ia. 526.....	436
Troy v. Smith & Shields, 33 Ala. 469.....	522
Trustees of Exempt Firemen's Benevolent Fund v. Rhome, 93 N. Y. 313.....	153
Tunnichiff v. Fox, 68 Neb. 811.....	252
Turner, Frazer & Co. v. Killian, 12 Neb. 580.....	254
Uihlein v. Gladieux, 74 Ohio St. 232.....	630
Union P. R. Co. v. Erickson, 41 Neb. 1.....	209
Union P. R. Co. v. Montgomery, 49 Neb. 429.....	288
United States Life Ins. Co. v. Vocke, Adm'r, 129 Ill. 557.....	552
Vail v. Vail, 10 Barb. (N. Y.) 69.....	427
Van Etten v. State, 24 Neb. 734.....	254. 801
Van Horn v. Hann, 39 N. J. Law, 207.....	616
Vannest v. Fleming, 79 Ia. 638.....	815
Voorhees v. Jackson, 10 Pet. (U. S.) *449.....	359

TABLE OF CASES CITED.

xxxiii

	PAGE
Wabash R. Co. v. Sharpe, 76 Neb. 424.....	663
Wagman v. Kessler & Co., 78 Neb. 263.....	498
Walker v. McAfee, 82 Kan. 182.....	62
Walsh v. Hall, 66 N. Car. 233.....	499
Walton v. Walton, 57 Neb. 102.....	242
Ward v. Ward, 86 Neb. 744.....	191
Wardell v. McConnell, 25 Neb. 558.....	398
Ware v. Cartledge, 24 Ala. 622.....	697
Warfield v. Lindell, 30 Mo. 272.....	451
Warren v. Brown, 31 Neb. 8.....	827
Wasey v. Travelers Ins. Co., 126 Mich. 119.....	553
Watkins v. Youll, 70 Neb. 81.....	838
Watson v. Jones, 13 Wall. (U. S.) 679.....	528
Wayman v. Southard, 10 Wheat. (U. S.) 1.....	359
Webb v. Hoselton, 4 Neb. 308.....	409
Weirich v. Cook, 39 Mich. 134.....	406
Weisser v. Southern P. R. Co., 148 Cal. 426.....	544
Welsh v. State, 60 Neb. 101.....	725
Western Travelers Accident Ass'n v. Holbrook, 65 Neb. 469.....	70
Western Travelers Accident Ass'n v. Tomson, 72 Neb. 674.....	793
Westinghouse Co. v. Tilden, 56 Neb. 129.....	584
Weston v. Commonwealth, 111 Pa. St. 251.....	703
Westover v. Carman's Estate, 49 Neb. 397.....	335, 342
Westover v. Hoover, 88 Neb. 201.....	770
Wharton v. Stevens, 84 Ia. 107.....	815
Wheaton v. North British & Mercantile Ins. Co., 76 Cal. 415.....	464
Whipple v. Giles, 55 N. H. 139.....	412
White v. German Ins. Co., 15 Neb. 660.....	220
White v. Ress, 80 Neb. 749.....	495
Whitney v. State, 53 Neb. 287.....	590
Widmayer v. Davis, 231 Ill. 42.....	71
Wilkins v. Allen, 18 How. (U. S.) 385.....	427
Williams v. Davenport, 42 Minn. 393.....	698
Williams v. Fears, 179 U. S. 270.....	354
Williams v. Miles, 63 Neb. 859.....	376
Willits v. Willits, 76 Neb. 228.....	704
Wilson v. Burr, 25 Wend. (N. Y.) 386.....	412
Wilson v. Griess, 64 Neb. 792.....	838
Winters v. Armstrong, 37 Fed. 508.....	86
Wisnleski v. Vanek, 5 Neb. (Unof.) 512.....	7
Wiswell v. First Congregational Church, 14 Ohio St. 31.....	531
Withrow v. Smithson, 37 W. Va. 757.....	617
Wolcott v. Patterson, 100 Mich. 227.....	411
Woodruff v. Taylor, 20 Vt. 65.....	219
Woodward v. Sarsons & Sadler, 32 L. T. (Eng. 1875) 867.....	73
Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175.....	535
Wright v. Hicks, 12 Ga. 155.....	427

	PAGE
Wuller v. Chuse Grocery Co., 241 Ill. 398.....	498
Wutchumna Water Co. v. Ragel, 148 Cal. 759.....	489
York v. Davis, 11 N. H. 241.....	62
Young v. Kinney, 85 Neb. 131.....	334
Young v. Quimby, 98 Me. 167.....	427
Zimmerman v. Hafer, 81 Md. 347.....	427

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED.

NEBRASKA.

CONSTITUTION.

	PAGE
Art. I, sec. 4.....	529
Art. III, sec. 16.....	150
Art. III, sec. 20.....	652
Art. VI, sec. 2.....	256
Art. VI, sec. 16.....	267, 610
Art. VII, sec. 1.....	65
Art. IX, sec. 1.....	474
Art. IX, sec. 7.....	149
Art. XII, sec. 3.....	150
Amendment (Comp. St. 1909, sec. 421 ^a).....	855

SESSION LAWS.

1877.

P. 168.....	486
-------------	-----

1879.

P. 275, sec. 112.....	198
P. 328, sec. 130.....	200

1885.

Ch. 73, sec. 1.....	199
---------------------	-----

1889.

Ch. 68.....	486
Ch. 68, secs. 12, 13.....	490

1891.

Ch. 13.....	633
-------------	-----

1895.

Ch. 39.....	150
-------------	-----

1903.

Ch. 73.....	469
-------------	-----

1905.

Ch. 161.....	230
Ch. 161, sec. 17.....	232

1909.

Ch. 147.....	231
--------------	-----

	1911.	PAGE
Ch. 105.....		538
REVISED STATUTES.		
	1866.	
P. 10, sec. 29.....		63
ANNOTATED STATUTES.		
	1903.	
Sec. 10706.....		535
	1909.	
Secs. 4466, 10914.....		447
Sec. 4468.....		445
Sec. 5005.....		218
Secs. 5317, 5320.....		730
Sec. 6248.....		783
Sec. 6752.....		495
Sec. 6955.....		677
Secs. 9818-9840.....		344
Sec. 9825.....		356
Secs. 10868, 10870.....		673
Secs. 10955, 10967.....		475
Sec. 10960.....		473, 477
Secs. 11012, 11031.....		472
Secs. 11113, 11114.....		20
COMPILED STATUTES.		
	1887.	
Ch. 23, sec. 29.....		224
Ch. 23, sec. 30.....		227
	1889.	
Ch. 2, art. II, sec. 3.....		61
Ch. 2, art. II, sec. 10.....		60
Ch. 2, art. II, sec. 18, subd. 3.....		64
	1891.	
Ch. 16, sec. 136.....		632
	1899.	
Ch. 14, art. 1, secs. 77, 104.....		421
Ch. 16, sec. 40.....		524
Ch. 16, secs. 40-44, 167.....		529
	1903.	
Ch. 14, art. I, sec. 110.....		420
Ch. 77, art. I, sec. 194.....		199
Ch. 77, art. I, secs. 204, 205, 206.....		197
Ch. 77, art. I, secs. 205, 221.....		235
Ch. 77, art. I, secs. 220, 221.....		200
Ch. 77, art. I, sec. 221.....		195

STATUTES, ETC., CITED.

xxxvii

	1905.	PAGE
Ch. 23, sec. 30.....		677
	1907.	
Ch. 28, secs. 5, 6a.....		585
Ch. 28, sec. 6b.....		587
Ch. 46, sec. 13.....		585
	1909.	
Ch. 7, sec. 8.....		160
Ch. 12a, secs. 43-47.....		556
Ch. 14, art. I, sec. 69, subds. XXI, XXVII.....		854
Ch. 14, art. I, secs. 106, 108, 109.....		419
Ch. 18, art. I, sec. 48.....		447
Ch. 19, sec. 37.....		257
Ch. 20, sec. 3.....		610
Ch. 21, secs. 1, 2.....		733
Ch. 21, sec. 3.....		364
Ch. 23, sec. 67.....		225
Ch. 23, sec. 140.....		216
Ch. 23, sec. 195.....		220
Ch. 23, sec. 201.....		376
Ch. 25, sec. 7.....		754
Ch. 25, sec. 12.....		411
Ch. 25, secs. 15, 16, 22.....		268
Ch. 26, secs. 103, 105, 107.....		655
Ch. 26, secs. 146, 151.....		72
Ch. 28, sec. 34.....		21
Ch. 30, sec. 11.....		151
Ch. 33.....		307, 344
Ch. 33, sec. 8.....		356
Ch. 33, secs. 8, 22.....		345
Ch. 33, secs. 8, 22, 23.....		308
Ch. 43.....		80
Ch. 43, sec 96.....		4
Ch. 43, sec. 112.....		792
Ch. 43, sec. 121.....		85
Ch. 43, sec. 124.....		86
Ch. 44, sec. 3.....		495
Ch. 52, sec. 3.....		702
Ch. 53, sec. 1.....		226
Ch. 55.....		259
Ch. 61, sec. 1.....		851
Ch. 61, sec. 14.....		850
Ch. 72, art. 1, sec. 1.....		247
Ch. 72, art. VIII, sec. 1.....		654
Ch. 72, art. VIII, sec. 2.....		855
Ch. 78, sec. 7.....		827
Ch. 78, sec. 110.....		855

	PAGE
Ch. 78, secs. 110-113.....	808
Ch. 78, sec. 147.....	37
Ch. 79, sec. 3, subd. XV.....	205
Ch. 81, sec. 1.....	401
Ch. 89, art. III, sec. 1.....	815

CODE.

Sec. 12.....	521
Sec. 22.....	560
Sec. 23.....	629
Secs. 77, 148.....	629
Sec. 94.....	4
Sec. 101	499
Sec. 128.....	163, 166
Sec. 131.....	697
Sec. 145.....	58, 142, 364, 820
Sec. 148.....	112, 624
Secs. 191, 191a.....	500
Secs. 252, 679.....	741
Sec. 253.....	744
Sec. 339.....	732
Sec. 341.....	802
Sec. 367.....	19
Sec. 532.....	540
Sec. 675.....	637

CRIMINAL CODE.

Sec. 25.....	765
Sec. 121.....	799
Sec. 201.....	703
Sec. 251.....	346
Sec. 570.....	596

UNITED STATES.

CONSTITUTION.

Art. I, sec. 8.....	309
Amendment, art. XIV.....	344

STATUTES AT LARGE.

June 30, 1906, vol. 34, pt. 1, p. 770, ch. 3915.....	311
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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1911.

**LENA M. LILLIE, APPELLEE, V. MODERN WOODMEN OF
AMERICA, APPELLANT.**

FILED APRIL 8, 1911. No. 16,365.

- 1. Appearance.** "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant." *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273.
- 2. ———.** "A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *Cropsey v. Wiggenghorn*, 3 Neb. 108.
- 3. Insurance: ACTION: DEFENSES: EVIDENCE: ADMISSIBILITY.** In a civil action upon a benefit certificate, issued by a fraternal beneficiary society, and which contained a clause that, if the death of the member shall occur by the hands of his beneficiary, except by accident, the certificate should be void, the fact, if true, that the beneficiary had murdered the assured would constitute a defense to the action. The evidence of the commission of the crime would depend upon the proof of the fact of the criminal act. A certified transcript of the record of conviction of the beneficiary is not admissible as substantive evidence of the facts upon which the prosecution was founded, nor of the fact of the murder of the assured by the beneficiary.
- 4. Trial: INSTRUCTIONS.** An instruction to a jury that the result of a criminal prosecution for the commission of the acts which would

Lillie v. Modern Woodmen of America.

avoid the certificate was not to be considered by them held
erly given.

5. **Evidence: ORAL EVIDENCE TO EXPLAIN LETTERS.** Certain letters written by plaintiff to a bucket shop dealer, were introduced in evidence by defendant. The meaning of the language contained in the letters could not be understood by one not acquainted with the circumstances under which they were written. That there was no prejudicial error in permitting plaintiff to explain the circumstances and her meaning in the language used.
6. **Insurance: TRIAL: QUESTION OF FACT.** The question of the truth of the assured by plaintiff was exhaustively investigated at the trial by the production of oral evidence of circumstances tending to prove and disprove the charge. The only witness present at the time of the killing of decedent was plaintiff, who took the witness-stand and testified to facts which, if true, establish her innocence. The question of fact was for the jury, and their finding on conflicting and circumstantial evidence the supreme court cannot interfere.

APPEAL from the district court for Lancaster county.
LINCOLN FROST, JUDGE. *Affirmed.*

Talbot & Allen, C. J. Garlow and Tibbets & Anderson
for appellant.

Matt Miller and L. C. Burr, contra.

REESE, C. J.

This action was commenced in the district court for Lancaster county, and is upon a benefit certificate for a sum of \$3,000, issued upon the life of Harvey Lillie, payable to Lena M. Lillie, his wife, upon his death. The certificate is in the usual form, and its averments need not be here specifically noticed, except to say that it is all in conformity with the charter of the Modern Woodmen of America, that defendant is a fraternal beneficiary society, incorporated and doing business under and by virtue of the laws of the state of Illinois, with its principal place of business in the city of Rock Island, in said state, and authorized to transact business in Nebraska. A summons was issued and returned by the sheriff of Lancaster county as having been served upon the defendant "by delivery

in person to E. M. Searle, Jr., state auditor, agent for service and attorney in fact for said Modern Woodmen of America, a true and certified copy of the same, and also on A. R. Talbot, head consul for Modern Woodmen of America, at his office and principal place of business of the Modern Woodmen of America in the city of Lincoln, within and for the state of Nebraska, by delivering to him in person a true and certified copy of this writ with all indorsements thereon."

The defendant filed a paper, of which the following is a copy, omitting the caption: "Comes now the defendant appearing specially, and for the purpose of this motion only, and objects to the jurisdiction of the court over the defendant and also over the subject matter of the suit for the following reasons: First. Because plaintiff's petition fails to show a legal capacity to bring or maintain said suit. Second. Because plaintiff's petition fails to show that she has any legal capacity to bring or maintain said suit in Lancaster county, Nebraska. Third. Because plaintiff's petition fails to show that the contract sued upon is one enforceable at law. Fourth. Because plaintiff's petition fails to show that she has complied with the statutory provisions of this state to entitle her to prosecute said action. Fifth. Because the court has acquired no jurisdiction over the defendant by reason of defects shown on the face of the petition."

This objection to the jurisdiction was overruled, and defendant's exception noted. It may be doubted if this was in fact and in law a special appearance for the sole purpose of challenging the jurisdiction of the court over the person of defendant. It will be noted that the challenge includes the contention that the court has no jurisdiction of the subject matter of the suit.

In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273, we held on rehearing (quoting the syllabus) that, "an appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal plead-

ing, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." This is practically a reiteration of the holding of the first opinion beginning at page 267 (71 Neb. 267), and in the body of which it is said that such an objection was "in the nature of a demurrer to the jurisdiction of the court, and was in itself an appearance in the case."

It will also be noted that the objections presented in the first and second grounds of challenge are practically, if not strictly, the grounds of demurrer contained in section 94 of the code. The paper filed constituted a general appearance in the case. Again at a later date defendant filed a demurrer to the petition, the second ground of which was that "the court has no jurisdiction of the subject matter of the action," and the third that "the petition does not state facts sufficient to constitute a cause of action." This, also, was clearly a general appearance, notwithstanding the demurrer contained the statement that it was filed "without any intention of waiving its rights to insist upon the special appearance overruled by this court." The simple fact of the presentation of the questions *was* a waiver of a special appearance, had one been made. On a still later date defendant filed a motion for a more specific statement of the petition, and that the court require certain facts to be set out therein. This, also, was a general appearance. *Cropsey v. Wighorn*, 3 Neb. 108; *Crowell v. Galloway*, 3 Neb. 215.

It is insisted by defendant that, under the provisions of section 96, ch. 43, Comp. St. 1909, an action of this kind cannot, without the consent of a defendant, be maintained in any court except where some of the conditions prescribed in that section exist. The section is as follows: "Such society may be sued in any county in which is kept their principal place of business or in which the beneficiary contract was made or in which the death of the member occurred, or in the county of the residence of such deceased member; but actions to recover old age,

sick or accidental benefits may, at the option of the beneficiary, be brought in the county of his residence."

In the brief of defendant it is said: "We will not contend that the action is not transitory, nor will we contend that the district court of Lancaster county could not have jurisdiction of the subject matter of (by) consent of the parties or waiver of defendant as to jurisdiction." It will appear from this that it is not contended that where consent is given, or rather where no objection is made, the judgment would be void, but of full force and validity. In effect the contention is that, where none of the conditions named in the section exists, it will depend upon the election of a defendant as to jurisdiction of the court to hear and determine the case upon its merits. If this should be held to be the true effect of the statute, it would rest with defendant to give or refuse to give the district court jurisdiction in all cases where none of the specified conditions exist. Suppose a beneficiary resided in this state, the assured resided and died in another state, the defendant, a foreign corporation, had no principal place of business in this state, and the contract was made in a foreign state, the beneficiary would find the doors of all the courts of the state closed against her, or him, and no suit could be maintained in this state in any court, except by virtue of the consent and permission of the defendant. We cannot give such construction to the section under consideration. Just what the purpose of its enactment was, whether to add to and extend the jurisdiction of courts, or to make certain the local jurisdiction where any one of the conditions exist, we need not now inquire. The district court is a court of general common law jurisdiction, and the statute has by general law provided methods of acquiring jurisdiction over the person of foreign companies of the class to which defendant belongs, and it will not do to say that by the section under consideration the method of acquiring jurisdiction by general law is destroyed and the procedure limited to cases where the provisions above referred to exist. Such

could not have been the purpose of the legislature. However, if the contention of defendant should be correct, there can be no doubt of the general appearance by defendant, and that alone would be consenting to the jurisdiction of the court over it. It has been suggested by some of the members of the court that the section (Comp. St. 1909, ch. 43, sec. 96) is intended to apply alone to domestic societies, and has no reference to foreign associations, to which class defendant belongs. But upon that question we express no opinion.

The answer, in addition to the presentation of the question of jurisdiction, being practically the same as the motion and demurrer, consisted of certain admissions and a general denial of unadmitted averments, and set out certain clauses of the application and benefit certificate, and alleged that plaintiff, in violation of the express terms of the certificate, had caused the death of the member by the wilful, intentional and unlawful act of her, the beneficiary—in short, that she had murdered him. The fact of her arrest, prosecution and conviction of his murder, the verdict of the jury finding her guilty of murder in the first degree, and her sentence to imprisonment in the penitentiary for life are set out by copy of the proceedings and judgment. Plaintiff moved the court to strike out that part of the answer setting out her trial and conviction. The motion was sustained, but no exception was taken to the order. The order did not include the allegation that plaintiff had murdered the assured, leaving that issue to be tried. Plaintiff replied by a general denial. A large number of witnesses were sworn, chiefly upon the issue thus presented, forming a bill of exceptions of near 2,300 pages of typewritten matter. This evidence became material by reason of there being a clause in the benefit certificate that, if the death of the member was caused “by the hands of his beneficiary, * * * except by accident,” the certificate should become null and void.

In addition to the oral testimony in support of the de-

fense that plaintiff had murdered the assured member, defendant offered in evidence certified copies of the information filed in the district court for Butler county charging plaintiff with the murder of Harvey Lillie, the assured, the verdict of the jury thereon finding the accused guilty and fixing her punishment at imprisonment for life, the judgment and sentence of the district court, the mandate of affirmance by the supreme court, and the judgment of the district court thereon. The offered documentary evidence was objected to by plaintiff as incompetent, immaterial and irrelevant. The objection was sustained, and the documents excluded, to which defendant excepted, and that ruling is now assigned for error. The purpose of the evidence now under consideration was evidently to strengthen and support the oral testimony adduced for the purpose of maintaining the defense pleaded in the answer. It could not be insisted upon as an adjudication of the fact in issue, or as a bar to a recovery, for it was not an action or proceeding between the same parties. Neither could it have the effect of an estoppel by record.

The question then arises: Was it competent as substantive evidence in this suit upon the benefit certificate to prove that plaintiff had, in fact, murdered her husband, the assured? The answer must be that it was clearly not admissible. In *Wisnieski v. Vanek*, 5 Neb. (Unof.) 512, it is held that where a defendant in a criminal prosecution enters a plea of guilty, and judgment is rendered thereon, proof of the plea may be received in a civil suit against him for damages growing out of the same transaction as an admission or confession of the act charged, but that it is not conclusive of the fact and may be controverted as any other open question; that it is not the judgment itself that is admitted against him. The record offered shows that there was a jury trial of the criminal prosecution, and therefore there was no plea of guilty. It is fundamental and elementary that in a civil suit, where the defense is that plaintiff had by a

criminal act violated the provisions of the contract upon which the action is based, the record of his conviction in a criminal prosecution of such criminal act, which is pleaded as a defense, cannot be received as substantive proof of such violation. 1 Greenleaf, Evidence (16th ed.) sec. 537; 2 Black, Judgments (2d ed.) sec. 529; 7 Ency. of Evidence, 850, and cases cited in note 80; 23 Cyc. 1348, and cases cited in note 28; Jones, Evidence (2d ed.) sec. 589 (606) p. 745; 1 Wharton, Law of Evidence (3d ed.) sec. 776; Underhill, Evidence, sec. 156; *Betts v. New Hartford*, 25 Conn. *180. See, also, *Sickler v. Mannix*, 68 Neb. 21. As the only purpose for which the record was offered was to establish the fact upon which the judgment was rendered and which was pleaded and insisted upon as a defense in this case, there was no error in excluding it. There is no doubt but that judgments of conviction are competent and sometimes important evidence in cases where they are admissible, as for the purpose of impeaching a witness, to establish outlawry, the destruction of civil rights, and the like, but in such cases the records are admissible only for the purpose of proving the existence of the judgments, and not to prove the facts upon which they were founded.

Instruction numbered 9 reminded the jury of statements and references to the alleged conviction of plaintiff in the district court for Butler county, and directed them to pay no attention to the result of that prosecution, that it had nothing to do with their verdict, and they should disregard all such statements and allusions. There was no error in the instruction. The fact of that conviction had no place in the trial of this cause.

It is said in defendant's brief that the court erred in permitting plaintiff to withdraw testimony of good character, but there is no indication as to where in the bill of exceptions the testimony or ruling can be found, as required by clause "h" of rule 9 of this court, and we will have to be excused from searching the four volumes of the bill of exceptions for that specific ruling.

It is argued that the court erred in allowing plaintiff to place her interpretation upon certain letters introduced by defendant which she had written to a certain bucket shop dealer in David City. Those letters were cautionary in their character, and to one unacquainted with the facts as she understood them are susceptible of two constructions—one in her favor, the other against her—and in some respects they were incomplete and their meaning was obscure. She was permitted to explain what she meant by certain phrases and sentences contained in them. The explanation consisted in a statement of the condition of her whole dealing, instead of a part only as she insisted had been unjustly used to her disadvantage. This was followed by the application of those facts to the language used—what she referred to—and what she meant. Common fairness would seem to give her the right to make the explanation, of the truth of which the jury would have to be the judge.

The question of the murder of the assured by plaintiff, the beneficiary, was thoroughly and quite exhaustively tried by the introduction of oral testimony, and all the facts and circumstances in connection with the death of the decedent appear to have been fully investigated. Plaintiff was a witness in her own behalf and gave her version of the death of her husband, which, if true, would demonstrate that she was not guilty of his murder. She was thoroughly and searchingly cross-examined. The whole subject was submitted to the jury, and their finding on the facts must be accepted as binding upon this court.

Complaint is made of the instructions given the jury by the court. They have been examined, and appear to have been given in accordance with the views herein above expressed, and do not require specific notice here. The main question of fact upon which the case depended was for the jury. We detect no reversible error by the district court.

The judgment is

AFFIRMED.

McGowan v. Gate City Malt Co.

JOHN M. MCGOWAN ET AL., APPELLEES, V. GATE CITY
MALT COMPANY, APPELLEE; JAMES STEWART & COM-
PANY, APPELLANT.

FILED APRIL 8, 1911. No. 16,373.

1. **Mechanics' Liens: SUBSTANTIAL PERFORMANCE OF CONTRACT.** In a suit to foreclose a mechanic's lien for labor performed and material furnished in the construction of a building under contract, relief will not be denied the plaintiff because of omissions in the performance of the contract in details of the work, or time of completion, when there has been a substantial performance on his part; the defendant having his remedy in damages.
2. ———: ———. The contract between the contractor and subcontractor provided for the payment of 80 per cent. of the value of material delivered and in place monthly, as the work progressed, the remaining 20 per cent. to be paid "within 30 days after the completion and acceptance of this work," but did not specify by whom the acceptance was to be made. The contract being thus incomplete, it is *held* that a substantial compliance therewith in the matter of execution and surrender of the work and material to the contractor was sufficient to enable the subcontractor to maintain his action, without waiting for the completion of the structure by the contractor and its acceptance by the owner, but subject to any defense the contractor might have for damages on account of noncompliance with details.
3. **Contracts: BUILDING CONTRACT: EXTRAS.** The contract between the contractor and subcontractor provided that no work done or material furnished by the subcontractor should be considered as extra or paid for as such, unless a separate agreement in writing therefor should be made before the commencement of such work or furnishing of such material. The contractor was a nonresident of the state, having its principal places of business out of the state. The work was under the direction of superintendents in charge and upon the ground. Extras were ordered by them and furnished by the subcontractor without such written agreement, that clause of the contract being ignored. It is *held* that the absence of such written agreement cannot, under the circumstances, furnish the contractor a defense to the claim for such extras actually furnished.
4. ———: ———: **CONSTRUCTION.** *Held, also,* That the clause in the contract that no orders for extra work should be given "by employees upon the job" did not include superintendents in charge.

McGowan v. Gate City Malt Co.

5. ———: ———: **LIABILITY FOR MATERIAL.** Where a contractor purchases and furnishes material to a subcontractor, informing him of the cost and the price that will be charged, the subcontractor has his election, either to accept and use the material or reject it. If he accepts and makes use of the material he will be held liable for the price previously fixed by the contractor.
6. **Appeal: EVIDENCE: SUFFICIENCY.** Where a claim was made by a subcontractor against the contractor for the use of scaffolding material belonging to such subcontractor, and the evidence showed that both parties had lumber of the kind upon the ground and used the same to some extent without discrimination, no sufficient proof of the quantity used nor value of such use being made, the evidence in support of such claim *held* insufficient to justify its allowance.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Judgment reduced.*

S. N. Taylor, S. C. Taylor, H. A. Hamilton and W. H. Hatteroth, for appellant.

Mahoney & Kennedy and McGilton, Gaines & Smith, contra.

REESE, C. J.

This is an action by plaintiffs, as subcontractors, against James Stewart & Company, as principal contractors, and the Gate City Malt Company, the owner, by which a judgment is sought against James Stewart & Company, contractors, and the foreclosure of a mechanic's lien on lot 6, in block 16, and lots 1, 2 and 3, in block 18, in the city of South Omaha, as against the owner of said property.

The pleadings are of great length and cannot be set out in detail here. It must be sufficient to say that it is alleged in the petition that the defendants James Stewart & Company entered into a contract with defendant Gate City Malt Company to furnish the material and construct buildings on the lots described above in the city of South Omaha, and subsequently, by a contract

McGowan v. Gate City Malt Co.

with plaintiffs, sublet a portion thereof to them and by which plaintiffs were to furnish the material and do the brick and concrete work for the prices and upon the terms set out in said contract, all of which was done and performed by plaintiffs, amounting to the total sum of \$31,923.49; that defendants had paid to plaintiffs thereon the sum of \$25,524.70, and no more, and that there remained due and unpaid thereon the sum of \$6,398.79, for which judgment was demanded as against James Stewart & Company, and for the foreclosure of the mechanic's lien as against the Gate City Malt Company. The contract with the items of account are set out in the petition as exhibits, but they need not be here stated.

The answer of defendants James Stewart & Company is of considerable length. By it the contract with plaintiffs is admitted, and, in substance, it is admitted that plaintiffs furnished material and labor thereunder, but by way of counterclaim it is alleged that plaintiffs so failed to comply with the contract as to result in serious loss and damage to defendants. Among the items presented by defendants are: Balance due on brick furnished to plaintiffs, \$113.25; demurrage on cars plaintiffs failed to unload, \$238; making connections of water pipes, \$65. It is alleged that by the terms of the contract 80 per cent. in value of the labor and material furnished by plaintiffs was to be paid as the work progressed; the remaining 20 per cent. was to be withheld until the work was finished and accepted; that the 20 per cent. is included in plaintiffs' petition, but that the work has never been accepted; that there is nothing due plaintiffs until such acceptance, and therefore the suit is prematurely brought and cannot be maintained; that owing to the many violations of the provisions of the contract, both in the manner of doing the work and the failure to complete the structure within the time limited by the contract, plaintiffs having thereby failed in its performance, no action can be maintained thereon. The answer of the Gate City Malt Company is practically a general denial of the averments

of the petition and of any indebtedness to plaintiffs, it having no contractual relations with them. Plaintiffs' reply to this answer is a general denial.

Plaintiffs' reply to the answer of James Stewart & Company is to the effect that they had brick of their own purchase, sufficient to meet all demands as the work progressed, and the purchase of brick by defendants was therefore unnecessary, but to accommodate defendants plaintiffs had used them and allowed defendants the same price for which they had purchased brick for themselves; that defendants had purchased their brick at 50 cents a thousand more than plaintiffs had purchased their own brick, but that they had accepted defendants' brick at the same price for which they had purchased, to wit, \$7 a thousand; that the demurrage charge was occasioned by the unnecessary purchase and shipment of brick in such large quantities by defendants that they could not be unloaded from the cars, the demurrage being caused by the unnecessary act of defendants, and plaintiffs were not liable therefor. It is alleged that the piping for water was done for defendants' own use and benefit, and not for or at the request of plaintiffs; that immediately upon the completion of the buildings the Gate City Malt Company, defendant, had taken possession thereof and has since occupied the same; that defendants are estopped to object to plaintiffs' work because all of said work was done under defendants' immediate supervision and direction. The cause was tried to the court, the result being a general finding in favor of plaintiffs. The amount found due, including interest, was \$7,282.37, and an order of sale was directed to issue for the sale of the property in case of nonpayment. Defendants James Stewart & Company appeal.

Each party has furnished elaborate, able and extended briefs, and the cause was quite exhaustively argued at the bar of this court. The bill of exceptions is of great length, and consists largely of details which it is impossible for us to follow without extending this opinion

to an unnecessary and unreasonable length. Reversing, to some extent, the order of the presentation of the subjects by defendants in their brief, we notice the contention that plaintiffs' action cannot be maintained upon the contract until there is a performance of its conditions by them. This contention is, in a general way, correct. That one cannot maintain an action on a contract without a prior substantial compliance on his part is the well-settled law, but this principle must have a reasonable application. If there is a substantial performance the action thereon may be maintained, but without prejudice to any set-off or counterclaim which may be presented by the defendant in the action. This is a reasonable and just rule, and is the well-settled law of this state. *Hahn v. Bonacum*, 76 Neb. 837, and cases there cited; *Nebraska Plumbing Supply Co. v. Payne*, 84 Neb. 390; *Grove-Wharton Construction Co. v. Clarke*, 86 Neb. 831. There can be no doubt but there was at least a substantial compliance with the plaintiffs' contract on their part, and therefore the action can be maintained, but subject to damages, if any, which defendants may have suffered.

Defendants further contend that the decree of the district court should be reversed "because the contract between the parties provided that the final payment of 20 per cent. (of the contract price) should be made only after the approval and acceptance of the work by the supervising architect." The contract provides that the payments for the work are "to be made on or about the 20th of each month at the rate of 80 per cent. of the value of material delivered and in place during the preceding month, as determined by the contractor or the architect; and the remaining 20 per cent. within 30 days after the completion and acceptance of this work." It may be noted that the contract does not specify by whom the acceptance of the work is to be made, whether by the architect, the owner, or the contractor. We are inclined to the belief that as between the contractor and the subcontractor (and they are the only parties to this appeal)

the completion of the work and its surrender to the contractor would be a sufficient compliance with this provision, but subject to any damage he might sustain by failure to comply with details. However, we do not base our decision exclusively upon this. The clause is incomplete, and a compliance with the contract is all that can be required under it. We do not think that the language should be construed to mean that the subcontractor should be compelled to await the final completion of the whole building by the contractor and its acceptance by the architect or owner before the 20 per cent. would become due. Nor do we understand that defendants so contend. Such a construction would be wholly unreasonable. In neither of these contentions can we see any just, legal or equitable reason why plaintiffs should not be permitted to maintain this action for what is justly due them, even though there had been no formal acceptance. *Hahn v. Bonacum, supra.*

The bill of exceptions contains a great number of charges by plaintiffs for extras alleged to have been furnished and extra labor performed by plaintiffs. The contract provides, in substance, that no work done or material furnished by the subcontractor shall be considered as extra or paid for as extra, unless a separate agreement in writing therefor shall have been made before the commencement of such work or the furnishing of such material. It is also stipulated therein "that no orders for work supposed to be 'extra' shall be given by employees upon the job or recognized as extra by the contractor." The contractors have their places of business in Chicago, Illinois, and other cities, and were represented in South Omaha upon the construction work by agents known as superintendents. It is shown by the evidence that many changes and extras were ordered by them, the orders complied with, and the extras in the way of labor and material furnished as required. Of all such extras so provided by plaintiffs we have not observed a single case where the orders were given or the material or labor

furnished under a separate agreement in writing as required by the contract. In *Campbell v. Kimball*, 87 Neb. 309, we held under somewhat similar conditions that, if this provision of the contract was ignored by the parties to it and the extras were ordered and furnished, the terms of the contract would furnish no defense to the claim for such extras. See, also, *Jobst v. Hayden Bros.*, 84 Neb. 735. Any other rule would be against conscience and would often work serious injustice. The contract between plaintiffs and defendants is signed "James Stewart & Company, by W. R. Sinks," and defendants are alleged to be a partnership. Their line of business as contractors extends over many states of the Union, and judging by their literature their places of business are in Chicago, New York, Pittsburgh and New Orleans, and therefore they necessarily transact their business and superintend their contracts by agents located at the points where their work is being done. The superintendents when placed in control of their construction work must be considered as representing the company, and are not "employees upon the job" in the sense as used in the contract. While in charge of the construction of a particular building, they are to all intents and purposes the company, and the line of conduct pursued by them in the way of giving directions will be as binding upon the company as if adopted by a member or general managing agent. The contention therefore that no recovery can be had for extras if furnished under the circumstances named cannot be sustained.

In addition to the great number of demands by plaintiffs, the defendants present a number of counter charges for material, damages for failure to comply with the contract, labor furnished plaintiffs, etc. On many, if not all, of these issues the evidence is conflicting and contradictory. Considering the great length of the bill of exceptions and these issues as presented, all of which have been examined and carefully read, the findings of the district court, in so far as they are approved, will not be

specifically noticed. The claims presented by plaintiffs were practically all allowed by that court, and its findings in that behalf will not be molested, except as hereinafter stated.

It appears from the evidence that defendants furnished to plaintiffs some 223,000 bricks to be used in the construction work. Judging by the correspondence shown in the record, defendants believed plaintiffs were not receiving, of the bricks ordered by them, a sufficient number to push the work as it ought to have been crowded, when, apparently without any request by them, the bricks were purchased by defendants, shipped and delivered to plaintiffs, and used by them. Invoices were furnished plaintiffs by defendants, together with checks payable to the person from whom the purchase had been made, with instructions that if found correct plaintiffs should transmit the checks to the seller, which was done. For those bricks defendants paid \$7.50 a thousand. The bricks which plaintiffs had contracted for were to be furnished them at the rate of \$7 a thousand. The evidence is clear that plaintiffs were advised of the price which defendants were paying, and that they refused to allow the 50 cents a thousand above the price they were paying. Had plaintiffs refused to accept and use the bricks furnished by defendants, they could not have been required to pay any portion of the price for which the bricks were purchased by defendants. But having been informed what the cost would be, and still accepting and using them, they ought in all good conscience to have given defendants credit for the price paid, instead of for the price at which they had contracted with those from whom they were purchasing. The difference is 50 cents a thousand or \$111.50, for which defendants are entitled to credit. As to other items of counterclaim presented by defendants, we can see no sufficient reason for reversing the findings of the district court, but will not discuss them separately here.

A claim is made against defendants for \$300 for the

McGowan v. Gate City Malt Co.

use of plaintiffs' scaffolding lumber by defendants, and which was allowed by the trial court. This claim is for the *use* of the lumber referred to, and of which some portion was broken and otherwise destroyed. Upon this part of the case the evidence is far from satisfactory. There is little, if any, doubt that in the construction of the immense building under contract the lumber of the parties became to some extent intermingled, and not much care was taken by either one to observe as to the ownership of their material of the class under consideration. Each had a large quantity on the premises. It was largely of inferior grade and value, so rendered by the use to which it was being applied. The evidence bearing upon the quantity used is largely, if not entirely, guesswork and estimates upon a very uncertain basis, and by some of the witnesses it is said there was no appreciable difference between the lumber used by each, belonging to the other. It is probable that to some extent the plaintiffs may have been the loser in this use, but there seems to be no way of even approximating the actual amount, if such loss has been sustained, and we are persuaded that this part of the demand has not been sufficiently proved.

Much time and attention upon the trial were devoted to a clause in the contract forbidding the erection of a hoist within the building, and which was violated by plaintiffs, and their hoist for lifting material was placed therein. This seems to have been necessary, owing to the contour and topography of the site upon which the building was erected. However, we fail to find any sufficient proof that defendants were in any way injured or damaged thereby, and the subject will not be further noticed.

As the decree of the district court was for \$411.50 more than we find plaintiffs entitled to, the cause will be remanded to that court, with directions to enter a decree in all respects similar to the one heretofore rendered except that the amount thereof shall be for \$6,870.87, instead of \$7,282.37, the same to bear interest from the

Lanning v. Haases.

date fixed in the original decree, to wit, April 19, 1909, at the rate of 7 per cent. per annum.

JUDGMENT REDUCED.

FAWCETT, J., not sitting.

ALICE T. LANNING, APPELLANT, v. JOHN HAASES, JR., ET AL., APPELLEES.

FILED APRIL 8, 1911. No. 16,384.

1. **Affidavits.** An affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void and no affidavit.
2. **Taxation: REDEMPTION: NOTICE: PROOF OF PUBLICATION: AFFIDAVIT.** The proof of the publication of a notice of the time within which redemption of real estate from sale for taxes can be made must be by affidavit. Such "affidavit" sworn to before a person who gives his official title as "U. S. Comm.," he having no authority to administer oaths, is not an affidavit within the meaning of section 367 of the code, and a tax deed issued thereon is void.

APPEAL from the district court for Box Butte county:
JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

A. W. Crites, for appellant.

William Mitchell and B. F. Gilman, contra.

REESE, C. J.

This action was commenced in the district court for Box Butte county for the foreclosure of a mortgage on the northwest quarter of section 22, township 25 north, of range 48, in said county. A number of persons were made defendants, but we have to do with but one; no

other defendant having appeared or filed briefs. The one referred to is Chenia A. Newberry, who claims to hold a tax deed upon the property by which it is claimed that all rights under the mortgage have been extinguished. Newberry answered setting up his alleged title under the tax deed, and issues were formed thereon as to its validity. The district court rendered a decree by which Newberry's tax title was held valid, refused a foreclosure of the mortgage, dismissed plaintiff's petition, and quieted Newberry's title. Plaintiff appeals.

If Newberry's title can be sustained, it must be conceded that the rights of the mortgagee were terminated, and she has no ground to complain. If the tax deed is defective to the extent of rendering that conveyance void, plaintiff has a right to foreclose her mortgage, subject to the lien for taxes, and from which she has the right to redeem. One of the principal questions as to the validity of Newberry's title seems to be as to the proof of the publication of the notice of the expiration of the time within which redemption could be made. The statute (Ann. St. 1909, secs. 11113, 11114) requires the giving of this notice, and, if necessary, its publication in a newspaper. It is provided that the proof of publication shall be by affidavit of the publisher, manager or foreman of the newspaper. "An affidavit is a written declaration under oath, made without notice to the adverse party." Code, sec. 367. If it must be under oath, it must be necessarily sworn to before some one authorized to administer oaths. The affidavit of publication was made before "T. J. O'Keefe, U. S. Comm." Just what "U. S. Comm." should be held to mean is not shown, but it is assumed that the letters and words were intended to mean "United States Commissioner." It is admitted by appellee that such officer has no power or authority to administer a binding oath in this kind of proceeding, and we have been unable to find where any such authority is given. This being true, it must follow that the statement contained in the writing by which an affidavit was attempted

Downey v. Coykendall.

to be made was not legally sworn to, and we are left with no affidavit or other proof of publication. The giving of the notice is a condition precedent to the issuance of a deed. Ann. St. 1909, sec. 11113. The proof thereof is specially prescribed. Ann. St. 1909, sec. 11114. It necessarily follows that the tax deed was ineffectual to pass the title to the purchaser, and plaintiff was entitled to the foreclosure of her mortgage and to redeem from the tax sale.

The decree of the district court is reversed, and the cause is remanded to that court, with directions to enter a decree canceling the title of defendant Newberry, and foreclosing plaintiff's mortgage.

REVERSED.

ALFRED W. DOWNEY ET AL., APPELLEES, V. FRANK COY-
KENDALL, APPELLANT.

FILED APRIL 8, 1911. No. 16,358.

1. **Judges: EXCESSIVE FEES: ACTION: DEFENSES.** A police judge sued under the provisions of section 34, ch. 28, Comp. St. 1909, for taking excessive fees may not justify the taking of such fees by mistake, ignorance, absence of a corrupt motive or the existence of an agreement by the party injured.
2. **Statutes: CONSTRUCTION: FEES.** Statutes giving fees are to be strictly construed and are not to be extended by implication, and where a complaint is filed against several persons the same fees should be charged as if there were but a single defendant until demand is made for separate trials, and then fees should only be charged for such extra duties as are necessarily caused by such separation.
3. **Evidence: DOCKET ENTRIES OF POLICE JUDGE.** Ordinarily the entries in the docket of a police judge, made by himself or under his direction, are conclusive evidence in an action against him for charging, demanding and taking excessive fees.
4. **Trial: DIRECTING VERDICT.** Where at the close of the evidence in a jury trial there is left no question of fact to be determined, it is

Downey v. Coykendall.

not error for the trial court to direct a verdict in favor of the party who under the law of the case is entitled to the judgment.

APPEAL from the district court for Hamilton county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Hainer & Smith and C. P. Craft, for appellant.

O. A. Abbott and J. H. Edmondson, contra.

BARNES, J.

This case is before us on a second appeal. The former appeal was from a judgment in favor of the plaintiff and resulted in a reversal. The cause was remanded to the district court, where it was tried a second time, and the plaintiff again had a directed verdict and the judgment, from which the defendant has appealed.

The action was brought to recover illegal fees alleged to have been charged and collected by the defendant as police judge of the city of Aurora in certain actions wherein the plaintiff and other members of the commercial club of that city were prosecuted for a violation of the city ordinances, together with the sum of \$50 as a penalty for charging and collecting such illegal and excessive fees. There is little or no conflict in the evidence, and it may be said that it appears, without question: That the defendant was police judge of the city of Aurora on the 8th day of January, 1906, at which time a complaint was filed with him charging the plaintiff and seven other persons named with maintaining a building wherein persons were unlawfully permitted to assemble for the purpose of drinking intoxicating liquors. The defendant thereupon issued a warrant for the plaintiff and the seven others charged with him, who were thereafter brought before the defendant, as such police judge. One of the persons thus arrested demanded a separate trial, which was had, and which resulted in a conviction and the imposition of a fine of \$50 and costs. Negotiations were

then had for a settlement of the case, and it was finally agreed that four of the eight persons should plead guilty of a disturbance of the peace and should each be fined the sum of \$10, and that upon the payment of such fines and the costs of prosecution the complaint should be dismissed. Pending the negotiations for this settlement, the city attorney filed another complaint against 24 persons, including the plaintiff and the other members of the Aurora commercial club, charging them with a like offense, and still another complaint against the eight persons first complained of for disorderly conduct. When the settlement was effected, defendant estimated the costs in all of the cases at \$175. He arrived at this estimate by treating the case of each individual defendant in each of said complaints as a separate and independent cause, and taxed the costs as if there had been 40 separate cases. This amount of \$175 was paid to the defendant, but there is a slight dispute as to the manner of its payment; the defendant contending that he received the gross amount with the understanding that, if when the costs were accurately ascertained such sum should be insufficient to liquidate the same, the parties making such payment would make good the deficiency, and, if such sum proved more than sufficient, the excess should be returned to them. It further appears that so much of defendant's docket as included the entries in each of those cases was introduced in evidence upon the trial, and those entries show conclusively and particularly each step that was taken from the time of the commencement of the proceeding until the settlement above mentioned was made. It thus appears that on the complaint in which eight persons were jointly charged eight separate cases were docketed; that fees for docketing eight complaints were taxed and charged against the defendant when, as a matter of fact, but one complaint was taken; that fees for issuing eight warrants were taxed and charged when but one warrant was issued; and that many other items of excessive and illegal fees were charged and taxed in those

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Downey v. Coykendall.

cases. It also appears that the settlement above mentioned was made on January 16, 1906, and upon that day the defendant's docket entry in each of the eight cases closed with the following: "January 16, 1906, at 9:00 A. M. This cause dismissed and costs paid. Frank Coykendall, Police Judge." There was a like entry taxing like fees in all of the other cases. Indeed, that fact is not seriously questioned, for it is said in the defendant's brief in speaking of the amount of illegal fees found by the trial court to have been collected: "We are satisfied that this amount is not correct, and that the costs and fees which the police judge had a right to collect on account of the services rendered by himself and the officers, and the fees to witnesses, exceeded the sum of \$94.60; but the fact is there was not due for fees upon these several matters, including the four fines each for \$10, the sum of \$175, being the amount deposited with the police judge." So it may be said that there is no dispute as to the fact that defendant actually received from the plaintiff and others a larger sum than the legal fees which could be taxed in the several cases which had been brought before him.

It is contended, however, that the defendant was not guilty of the charge of collecting and receiving illegal fees, because of the agreement above mentioned. We are satisfied that the agreement or understanding which is pleaded by the defendant in justification of his action was made or had substantially as claimed by him. Therefore, the main question for our determination is: Does that agreement or understanding constitute a defense to the plaintiff's cause of action? A like question was before this court in *Cobbey v. Burks*, 11 Neb. 157, 38 Am. Rep. 364. In that case we held: "Mistake or ignorance without corrupt intent is no defense in an action on the statutory penalty for an officer taking greater fees than are allowed by law." It appears that Pennsylvania has a statute similar to our own, and a like question was before the supreme court of that state

Downey v. Ooykendall.

in *Coates v. Wallace*, 17 Serg. & Rawle (Pa.) 75, and it was said by that court: "The penalty imposed by this act may be incurred by exacting fees, which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the *taking* is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention, clearness and precision. On any other principle, a conviction would seldom take place, even in cases of the most flagrant abuse; for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril, and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids." That language was quoted and approved by this court in the case first above cited. *Leese v. Courier Publishing & Printing Co.*, 75 Neb. 391, was a case where the defendant ordered a transcript in order to perfect an appeal, and as a condition for making such transcript the justice required the defendant to pay him 10 cents for filing the appeal bond, 15 cents for entering it on the docket, and 25 cents for its approval and the memorandum of approval indorsed thereon. A portion of those fees the justice was not entitled to charge or receive, and we said in the opinion in that case: "We entertain no doubt that these charges were made and collected by the plaintiff in error in the utmost good faith, with the conviction that he was entitled to charge and receive the same; however, in doing so he acted at his peril. The statute as applied to the facts in this case is manifestly unjust. It is evident, however, that under the facts there was no course open to the trial court except to direct a verdict for the plaintiff." And a judgment against the justice for the statutory penalty was affirmed.

Downey v. Coykendall.

As above stated, the docket of the police court was introduced in evidence. The defendant is bound by the recitals contained therein, for those entries were made by him, and they conclusively show that he not only taxed the illegal fees in question, but declared over his own signature that they were paid. We therefore conclude that the agreement or understanding relied on by the defendant related to the cases which were commenced subsequent to those founded on the first complaint and is no defense to this action.

It is contended, however, that the trial court erred in not submitting that question to the jury. This contention is not sound because, conceding that the agreement relied on by the defendant was made as claimed, its legal effect was a question for the court, and not one to be determined by the jury.

Finally, defendant insists that the jury should have been allowed to determine the amount of the illegal fees in question. It appears that the docket entries made by the defendant contain all of the items of fees and costs charged and received by him, and it was the duty of the trial court to separate the legal from the illegal charges, and thus ascertain the correct amount of fees which the defendant was entitled to charge and receive. In conclusion, we may say that we are satisfied from an examination of the record that the finding on that question is fully sustained by the evidence, and that the judgment appealed from is the only one which could have lawfully been rendered in this case. Therefore the court did not err in directing a verdict for the plaintiff.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

REESE, C. J., dissenting.

I cannot agree to the opinion of the majority in this case. I do not think the mere fact that defendant entered

Downey v. Coykendall.

the illegal fees upon his docket is of itself a violation of the statute or creates a cause of action. He may have thought he was entitled to them and so entered them upon his docket, yet that fact alone does not render him liable. His ignorance is no excuse, but it does not of itself create a liability. In order to create a liability for the penalty, or liquidated damages, the officer must take the excessive fees. Defendant did not do this. It is not enough that he "demand" the fee, although defendant did not do even that. It was discovered that a number of men had violated the law: A multitude of arrests followed. For reasons which were deemed proper and right, it was agreed that pleas of guilty should be entered and a light fine imposed, together with taxation of costs in each case. The amount of costs could not be *then* ascertained and taxed. It was agreed that a certain amount of money should be left with the defendant, and, if it should be found not to be sufficient, the deficiency should be made up by the arrested parties. Should the amount be found to be too much, the excess or overpayment should be refunded to them. This was a lawful agreement. It was simply a case of mutual trust and confidence. The amount agreed to be left with defendant was \$175. By all rules of law, justice or common understanding it was simply a deposit with him to secure or make certain their payment, and subject to future computation or investigation. He held the deposit, and a short time later requested the attorney who appeared for defendants in the criminal prosecutions to assist in the investigation of the question of the fees in order that the correct amount might be ascertained, but the attorney declined to do so. He then called upon some of the parties themselves to join in the inquiry, but they refused. Nothing was left for him to do but to await their will and pleasure, holding the deposit subject to what might be found to be due. It may be said that there was no agreement that they should assist in the investigation and computation; but the very fact that the agreement was made that the matter should be held open im-

Latson v. Buck.

plied their friendly assistance. The case strikes me as one of exceedingly bad faith on the part of the members of the so-called "Commercial Club," and, as expressed by one of them, an effort to "cinch" defendant by reason of his reliance upon their personal honor and integrity, which, as it turned out, proved to be absent. I cannot but look upon the action of the parties and this suit as an unfair, unjust and dishonest proceeding in order to obtain revenge against an officer who, so far as this record shows, sought to discharge his duty and at the same time accommodate the arrested parties so far as he might by a reliance upon their personal honor.

I agree that the fee statutes should be strictly construed as against the officers of the law, and that it is right to enforce its penalties when deserved, but I am far from believing that the law is a trap into which officers may be thus inveigled simply because they rely upon the word of those with whom they are called to deal.

I believe the judgment of the district court should be reversed.

**ELLA E. LATSON, APPELLANT, V. OLIVE D. BUCK ET AL.,
APPELLEES.**

FILED APRIL 8, 1911. No. 16,966.

1. **Brokers: AUTHORITY: SALE OF LAND.** A real estate agent having the land of another for sale or trade, under an agreement with his principal by which he is to have all he can obtain over and above a certain fixed amount for his commission, may, in the absence of actionable fraud or deceit or objection by his principal, fix its selling or trading price at any sum at which he may be able to lawfully sell or otherwise dispose of it in trade.
2. ———: **COMMISSIONS: RIGHTS OF PURCHASER.** Where a third party in purchasing or trading for such real estate causes a part of the consideration to be conveyed to the agent, or to another designated by him, which is retained by such agent as his commission, such third person, in the absence of actionable deceit, fraud or confidential relation, cannot maintain an action to re-

Latson v. Buck.

cover the property which was retained by the agent as commission.

3. ———: ACTION FOR FRAUD: EVIDENCE, Evidence examined, and found insufficient to establish either the relation of principal and agent between the plaintiff and the defendants, or such fraud or deceit as would entitle the plaintiff to equitable relief.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Byron G. Burbank and John C. Wharton, for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

This case is before us a second time. By our former opinion it was held that the allegations of the petition were sufficient to state a cause of action, and the judgment of the district court sustaining an objection to the introduction of any evidence in support of it was for that reason reversed. Thereafter there was a trial of the case upon its merits, which resulted in a general finding in favor of the defendants, and a dismissal of the action for want of equity. The plaintiff has appealed from that judgment.

It appears that the action was based on the theory that the defendants, by taking advantage of the confidential or fiduciary relations alleged to have been in existence between them and the plaintiff as principal and agent, defrauded her and obtained title from her to three certain houses and lots in the city of Omaha, which she prayed the court to order the defendants to reconvey to her, and for general equitable relief.

This being an appeal in equity, we have tried the case *de novo*. From a careful consideration of the evidence, it appears: That in the month of August, 1907, one T. B. Holman was the owner of 230 acres of land in Sarpy county; 160 acres of this land was clear of incumbrances, but on the remaining 70 acres there was due the state the

Latson v. Buck.

sum of \$568 as a balance of the purchase price; that on the 24th day of that month Holman and the defendants David R. Buck and son entered into an agreement by which the defendants were given an option to handle, sell or purchase said land, and were to have as their commission all they could obtain for it over and above the sum of \$2,500; the purchaser was to assume the payment of the amount due to the state as aforesaid, and Holman was to receive \$2,500 in cash. Thereupon the defendants, who were real estate dealers, doing business in the city of Omaha, proceeded to advertise the farm for sale or trade. At the same time the plaintiff was the owner of the lots in question, on which there were three small dwellings. It appears that she was anxious to exchange her property for a flat or rooming house, and to that end went to the office of the defendants and interviewed the elder Buck, informing him of her desires. At that interview he informed her that one Doctor Impey was the owner of a brick house which he desired to exchange for other property. It appears that she saw Doctor Impey, but failed to make any arrangement with him, for the reason that he did not want her property, as it would not suit his purposes. It further appears that the defendants informed the plaintiff that they had the land above mentioned for sale or trade, but were unable to offer it to her at that time because they had another customer with whom negotiations were pending. It also appears that later on the negotiations were discontinued, and thereupon the defendants informed the plaintiff that they would trade the land to her for her houses and lots, if satisfactory arrangements could be made. It seems that at first she was not disposed to trade for the land, but later on concluded to examine it, and went with the defendant David R. Buck, Sr., to the premises, where they spent a part of a day, and made a thorough examination of the land, its quality, location, improvements, and everything connected with it; that the plaintiff at that time procured samples of the corn growing on the land, and of the hay, which was

then in the stack, and took the same home with her in order to consult with her sister about the advisability of making a trade. Meanwhile the defendants had inquired the price of the plaintiff's property, and she informed them that she considered the lots in question worth \$4,500.

Thereafter the defendants informed the plaintiff that they would trade her the farm for her houses and lots, she to assume the balance of the purchase price due the state on the school land, pay them the sum of \$1,500 in cash, and convey her houses and lots to whomsoever they might designate. At first she informed the defendants that she thought they ought to make a less price, or induce the owner to sell or trade the property to her for a less price than that above mentioned. Later on they informed her that that was the best they could do so far as the price was concerned. She thereupon agreed to convey her houses and lots to whomsoever the defendants might name, pay a small plumbing bill of \$75.10 that might become a lien on her houses, pay the defendants \$1,500 in cash, and assume the balance of the purchase price due the state upon the land in question and they on their part were to convey the land to her, or to whomsoever she might designate. She thereupon paid the defendants \$200 to bind the bargain, taking their receipt for the same, and entered into a written agreement in accordance with the terms and conditions of the trade as above stated. The defendants procured an abstract of title to the farm and delivered it to the plaintiff, and it appears that she did not rely on the defendants in this matter at all, but took the abstract of title to one Judge Covell, a practicing attorney in the city of Omaha, for his examination and opinion. Some defects were found in the abstract, which were finally corrected in accordance with the suggestions of her attorney.

In the meantime Holman, the owner of the land, and his wife, returned from Colorado, where they were then living, to Sarpy county; and upon being notified of the pending trade they came to the office of the defendants and executed and delivered a deed of the land to the plain-

Latson v. Buck.

tiff. She thereupon procured a deed of the houses and lots in question to be executed and delivered to the defendant Olive D. Buck. A mortgage upon her houses and lots was executed to a loan company represented by Honorable John C. Wharton for a sufficient sum of money with which to pay the difference between the \$1,500 in cash to be paid by the plaintiff and the \$2,500 which was the cash purchase price of the land, which was to go to Mr. Holman. The negotiations were concluded, the loan procured, the trade was completed, the conveyances were all made, and the deal was thus finally closed. It appears that about a year and a half after the transaction was completed the plaintiff ascertained by inquiry from Holman, the former owner of the land, that he had received from the defendants \$2,500 as the purchase price of his land, instead of some Colorado property which she says she understood was to be exchanged therefor. The plaintiff thereupon informed Holman that the defendants had cheated him, and that he ought to sue to recover the houses and lots in question. This he declined to do, and stated to the plaintiff that he had received all that he asked for the land, and was satisfied with the whole deal. Thereafter she conceived the idea that the defendants had cheated her out of her houses and lots, and commenced this action to recover them.

The testimony discloses, without dispute, that the plaintiff was familiar with the values of real estate; that she was, to some extent, a real estate dealer on her own account and for others. Upon her cross-examination she admitted that during her residence in Omaha, of some 15 or 20 years, she had been engaged for herself and others in from 20 to 40 real estate deals. While on the witness-stand she declared positively that she considered the defendants as her agents in making the trade in question; but her statement must give way to the fact as disclosed by the great weight of the evidence, which convinces us that she acted wholly for herself in the transaction complained of. It appears that she knew—in fact, she admitted that she knew—the defendants were the agents of Holman for the

Latson v. Buck.

sale of his land—she stated in conversation with several of the witnesses that the defendants said something about their having an option on the land. Four or five disinterested witnesses testified that while the negotiations were pending, and at or about the time the abstract was examined, the plaintiff informed them that she believed the defendants were getting her houses and lots for their commission, but that it did not make any difference to her, because she was making a good trade anyway. This the plaintiff denied, but we are constrained to accept the testimony of disinterested and apparently unprejudiced witnesses in preference to the plaintiff's statements. It appears that the plaintiff was a shrewd business woman, and made no mistake in consummating the trade in question. The value of the land which she procured was at that time from \$35 to \$40 an acre, the lowest estimate of its value was \$35 an acre. It appears that the houses and lots in question which she conveyed to the defendant Olive D. Buck were actually worth at that time between \$2,500 and \$3,000, the highest estimate of their value being \$3,000. It thus appears that she obtained the land in question, worth at that time at the lowest calculation \$7,150, in exchange for her houses and lots, worth \$3,000, \$1,500 in cash, and the assumption of the payment of \$568, the balance of the purchase price for the 70 acres of school land. She therefore paid for the land the equivalent of \$5,068; she has ever since retained it, and has never offered to convey it either to the defendants or to Holman; she made, by the exchange of the property and money for the Holman land, about \$2,000; while the defendants, as their commission on the transaction, obtained an equity in the houses and lots, which the plaintiff conveyed to Olive D. Buck, of the value of \$2,000.

At first it seemed strange to us that Holman would part with so valuable a tract of land for so small an amount of money, but he explained that matter upon the witnessstand by saying that he had moved to Colorado at the time he gave the defendants the option on his farm; that he

Schultz v. State.

wanted to dispose of it because at that time the Missouri river had headed for it, and he was of the opinion that it would be all washed away in a short time, and he wanted to get all he could out of it before that contingency happened. It appears, however, that before the plaintiff went to examine the land the river had changed its course, the current having set in another direction, and so the land was left intact, and its undisputed value at the time the trade was consummated, was \$7,150.

It follows that the district court was right in his general finding for the defendants, for there appears to be no equity in her case. The judgment of the district court is therefore

AFFIRMED.

ALEX SCHULTZ V. STATE OF NEBRASKA.

FILED APRIL 8, 1911. No. 16,995.

1. **Homicide: OPERATION OF AUTOMOBILE: MANSLAUGHTER: INFORMATION.** Substance of the information stated in the opinion, and *held* sufficient to charge the defendant with the crime of manslaughter by carelessly, recklessly, unlawfully and wilfully driving his automobile on the public streets and highways of the city of Omaha, thereby causing the death of another.
2. ———: ———: ———. One who drives an automobile wilfully, recklessly, carelessly and negligently, and at a rate of speed forbidden by the statute, upon the public streets or highways of this state, and thereby causes the death of another, is guilty of criminal homicide.
3. ———: **INSTRUCTIONS: AUTOMOBILES: UNLAWFUL SPEED.** On the trial of a person charged with such crime, it is permissible for the court to define an unlawful rate of speed in the language of the statute regulating the use of motor vehicles upon the public streets and highways of this state.
4. **Constitutional Law: POWERS OF JUDICIARY AND LEGISLATURE.** Ordinarily the courts will not substitute their opinions for the judgment of the legislature as to the reasonableness of an act fixing the rate of speed at which motor vehicles may be lawfully driven.

Schultz v. State.

5. **Criminal Law: INSTRUCTIONS.** Where the substance of an instruction requested by the defendant has been given by the court upon his own motion, he is not required to repeat it because of such request.
6. ———: ———. Where there is no evidence upon which to predicate a requested instruction, it is proper for the court to refuse to give it.
7. **Homicide: OPERATION OF AUTOMOBILE: NEGLIGENCE.** Where a person wilfully, recklessly, carelessly and negligently, and at an unlawful rate of speed, as defined by the statute, drives his automobile upon the public streets and highways of this state and thereby kills another, negligence of the driver of another car in which the deceased was riding when he was killed cannot be invoked, under ordinary circumstances, to relieve such person of criminal liability.

ERROR to the district court for Douglas county: **LEE S. ESTELLE, JUDGE.** *Affirmed.*

W. W. Slabaugh, J. W. Battin and S. F. Neble, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

BARNES, J.

Alex Schultz, hereafter called the defendant, was prosecuted in the district court for Douglas county on a charge of manslaughter. His trial resulted in a conviction, and he was sentenced to serve a term of three years in the state penitentiary. From that judgment he has brought the case here by a petition in error.

1. Defendant's first contention is that the information on which he was tried does not charge a crime, in that it fails to state that defendant committed an assault. The charging part of the information reads as follows: "That on the 21st day of June in the year of our Lord nineteen hundred and ten, Alex Schultz, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being in said county, and then

and there being upon a public highway, to wit: at the intersection or crossing of Thirty-fourth and Leavenworth streets in the city of Omaha, which said streets are public highways, and the said Thirty-fourth street at the point aforesaid being a part of the boulevard system of said city, and the said intersection or crossing being a place at which there is much traffic, did then and there negligently, carelessly, recklessly, unlawfully and feloniously drive, propel and operate a motor vehicle, commonly called an automobile, upon said public streets and highways and at said crossing or intersection aforesaid, at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of said streets and highways at the place aforesaid, and having regard to the safety of the public, and did then and there so drive, propel and operate said automobile at a rate of speed so as to endanger the life and limb of persons using and traveling said streets and highways at the point aforesaid, and at a rate of speed in excess of the rate permitted by law, and then and there, while so negligently, carelessly, and unlawfully propelling, driving and operating said automobile, did in and upon one William Krug make an assault, and the said automobile which he, the said Alex Schultz, was then and there upon said streets and public highways, and at said intersection and crossing, so negligently, carelessly and unlawfully propelling, driving, and operating, in and against the said William Krug unlawfully and maliciously did force and drive, and him, the said William Krug, did then and there throw to and upon the ground, curbstone and pavement, and did then and there and thereby give to the said William Krug, in and upon the upper part of the body and head of him, the said William Krug, certain contusions, fractures and mortal wounds, of which the said William Krug on said 21st day of June, 1910, in said county and state did die; and so the said Alex Schultz, him, the said William Krug, in the manner aforesaid, and unintentionally while in the commission of said unlawful act, did then and there unlaw-

fully and feloniously kill and slay; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska."

It thus appears that the information not only charges an assault, but contains every element necessary to constitute the crime of manslaughter. The record also discloses that the defendant fully understood the nature of the charge against him, and conducted his defense in such a manner as to have exonerated himself from criminal liability had the jury believed his evidence. A like question was before the supreme court of Missouri in *State v. Watson*, 216 Mo. 420, upon a similar information, in which the defendant was charged with killing a pedestrian while carelessly, recklessly and negligently running his automobile over and upon a certain street in the city of St. Louis. Speaking of the information in that case, the court said: "This, in our opinion, is a sufficient charge and fully informed the defendant of the nature and character of the offense he was called upon to answer. It was not, in our judgment, essential that the information should undertake to set out in detail in what such carelessness, recklessness and culpable negligence consisted, but the charge that he operated and propelled this automobile along a public street carelessly, recklessly and with culpable negligence was in effect notifying the defendant that he was not using, operating or propelling his automobile in accordance with the law or the ordinances of the city regulating the use and operation of such machines." From the foregoing we are of opinion that the information in this case was sufficient in all respects to charge the defendant with the offense of which he was convicted.

2. Defendant's second and third assignments of error will be considered together. They each, in a different form, raise the question of the rate of speed at which automobiles may be operated upon the public streets and highways of this state. By section 147, ch. 78, Comp. St. 1909, it is provided: "No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reason-

able and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or in any event in the close built-up portions of a city, town or village, at a greater rate than one (1) mile in six (6) minutes, or elsewhere in a city, town or village, at a greater rate than one (1) mile in four (4) minutes, or elsewhere outside of the city, town or village, at a greater rate than twenty miles per hour; * * * and in no event greater than is reasonable and proper, having regard to the traffic then on such highways and the safety of the public." The trial court by paragraph 5 of his instructions charged the jury in substance that, in order to convict the defendant, they must find from the evidence beyond a reasonable doubt that William Krug was alive June 21, 1910; that on the same day he was killed, and his death was the result of an unlawful act on the part of Alex Schultz; that such killing occurred on the streets of Omaha; that it was the result of a collision between the automobile driven by Schultz at an unlawful rate of speed and the automobile in which Krug at that time was riding. In defining an unlawful rate of speed, the court's instruction, No. 6, stated the substance of the section of the statute above quoted. The giving of those instructions is jointly assigned as error, and it is argued that the conviction cannot be maintained solely because of a violation of the speed limit fixed by law. It will be observed that this case is not prosecuted solely for a violation of the speed limit fixed by the statute, but is based in fact on the negligent, reckless, careless and dangerous driving of his automobile by the defendant. In a recent case in Connecticut the defendant was found guilty of manslaughter in negligently and recklessly driving his automobile over a man named Morgan. In that case the court took occasion to read to the jury the automobile act of that state, which is quite similar to the statutes of Nebraska, regulating the use of automobiles on public streets and highways. It was claimed that it was error to read those statutes and apply them in that case, but the supreme court of Connecti-

Schaetz v. State.

cut found no error in the instruction. It was there said: "One who wilfully drives an automobile in a public street of this state at a rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another is guilty of criminal homicide." *State v. Campbell*, 82 Conn. 671.

It will be observed that by instruction 5 the court told the jury that to find the defendant guilty they must find from the evidence beyond a reasonable doubt that he operated his machine at an unlawful rate of speed. This is explained in instruction No. 6 as a speed greater than is reasonable and proper, having regard to the traffic and the use of the highway, or so as to injure the life or limb of any person, as defined by the words of the statute, and it was thereupon properly left to the jury to determine whether or not the defendant was driving his automobile at an unlawful rate of speed when the collision occurred. We find no error in the instructions complained of.

It is argued that the act regulating the speed of motor vehicles is unconstitutional and void, because it is unreasonable. No authorities are cited in support of this argument, and we doubt if any authority can be found to sustain it. The act seems to be a proper exercise of the police power of the state. The legislature no doubt was aware of this new method of public travel, and, recognizing the fact that the automobile furnishes a means of transportation by which a speed may be attained greater than by any other vehicle in common use, deemed it necessary to regulate its use in such manner as to prevent collisions and accidents like the one in the case at bar, and, having due regard to the safety of life and limb of all persons rightfully upon our public streets and highways, passed the act in question defining the methods of operation and the rate of speed which would in their judgment best subserve the public interest. In such case the courts should not under ordinary circumstances substitute their

opinions for the judgment of the legislative branch of the government as to the reasonableness of such regulation.

3. Error is assigned because of the refusal of the trial court to give instructions 17, 24, and 26, requested by the defendant. By No. 17 the court was asked to instruct the jury that, if they had any reasonable doubt that the death of William Krug was the natural and probable result of the collision, they should find the defendant not guilty. It appears that the substance of that instruction was given by the court on his own motion, and it was unnecessary to repeat it at the request of the defendant.

By instruction No. 24 the court was asked to charge the jury that, if they had any reasonable doubt as to whether or not William Krug was thrown from the gray car because of the plunge forward by the gray car, and that as a result of being thrown from said car he was killed, and that such plunge forward was made by the driver of the gray car, then they should find the defendant not guilty. That instruction was properly refused because there was no evidence upon which to predicate such a defense, as we shall presently see. Instruction 26 was in substance a repetition of instruction 24, and was therefore properly refused.

4. Error is assigned for giving instruction No. 7 by the court on his own motion, and the refusal to give instruction No. 25 requested by the defendant. By instruction No. 25 the court was requested to instruct the jury on the law of contributory negligence, to wit, negligence on the part of the driver of the car in which Krug was riding. In support of this contention defendant cites *State v. Stentz*, 33 Wash. 444. In that case the jury were informed that if they should find from the evidence that the deceased came to his death by the mutual mistake of the deceased and the defendant in the honest endeavor to avoid a collision both on the part of the deceased and the defendant, then in that event such killing would be accidental, and not criminal, and their verdict should be not guilty. But in the same paragraph it was further said: "Gentlemen

of the jury, I instruct you that, if the defendant was at the time alleged in this information engaged in an unlawful act, to wit, the act of driving horses and a wagon upon the public highway in such a manner as to endanger the lives and persons of others, and such unlawful act resulted in the killing of the person named in the information mentioned, it would then be immaterial whether the killing was accidental or intentional. The defendant would be guilty." It will thus be seen that the case cited does not support the defendant's contention. On the other hand, in *State v. Campbell, supra*, the court said: "Contributory negligence, as such, is not available as a defense in a criminal prosecution for a homicide caused by the gross and reckless misconduct of the accused; although the decedent's behavior is admissible in evidence, and may have a material bearing upon the question of the defendant's guilt. If, however, the culpable negligence of the accused is found to be the cause of the decedent's death, the former is responsible under the criminal law, whether the decedent's failure to use due care contributed to his injury or not." The rule of law concerning contributory negligence by the injured person, as a defense in civil actions for damages for personal injuries had no application to this case. The state was required to prove the alleged unlawful act of the accused and its consequences, but not that the deceased exercised due care to avoid the consequences of the unlawful act. The authorities are not in conflict as to this question. Uniformly the courts have said a man will not be excused for killing another, even though his victim was negligent. While contributory negligence is a complete defense to an action for private injury resulting from homicide, it is no defense to a prosecution for a public wrong. 21 Am. & Eng. Ency. Law (2d ed.) 195. We think the refusal of this instruction was clearly right for the further reason that the evidence disclosed no theory upon which such an instruction could be predicated.

It is also contended that there is a distinction between

offenses *mala prohibita* and *mala in se*. The distinction, if any, is not accounted of much practical consequence by the text-writers. 21 Am. & Eng. Ency. of Law (2d ed.) 190; 1 Bishop, New Criminal Law, sec. 333. In *State v. Stanton*, 37 Conn. 421, it was said: "Where a man was knowingly engaged in a criminal act, and unintentionally committed a greater offense than the one intended, proof of an intent was not essential to a conviction for the latter crime. We perceive no error in this part of the charge. The defendant claims that the proposition of the court, though correct when applied to crimes which are *mala in se*, is not correct when applied to crimes which are *mala prohibita*. We do not recognize the distinction as law. The cases cited by the defendant's counsel are all cases where the prisoner was engaged in doing a lawful act and the offense was committed through carelessness." There seems to be no conflict in the decisions where the defendant is violating some statute, and where his manner is negligent and careless. The courts in such cases uniformly say that he is guilty of manslaughter if the death of some other person is the result. *Ford v. State*, 71 Neb. 246; *Flinn v. State*, 24 Ind. 286; *Bias v. United States*, 3 Ind. Ter. 27, 53 S. W. 471; *Adams v. State*, 65 Ind. 565; *Thompson v. State*, 131 Ala. 18; *Irwin v. Judge*, 81 Conn. 492; *State v. Watson*, 216 Mo. 420.

5. It is contended that the verdict is not supported by sufficient evidence. This question is not discussed in the defendant's brief. We deem it proper, however, to state the facts as they appear from the record. On the morning of June 21, 1910, the deceased and his friend McCormick were riding in an automobile driven by one William H. Wallace. They were going north on what is called Central boulevard, which is one of the principal streets of the city of Omaha. As they approached the intersection of the boulevard with Leavenworth street, which is also one of the principal thoroughfares of that city, they were driving at the rate of from eight to ten miles an hour. The southeast corner of Leavenworth street, where it crosses the

boulevard, is what is called a blind corner. It appears that trees and shrubs were growing on the east side of the boulevard clear up to its intersection with Leavenworth street, so that persons approaching from the east on that street were unable to see vehicles approaching from the south on the boulevard until they reached the intersection. While the car in which the deceased was riding was crossing Leavenworth street, the automobile driven by the defendant approached the intersection from the east at an excessive rate of speed, and struck it with such force as to cause the death of Mr. Krug. The state produced five or six persons, some of whom were within 100 feet of where the collision occurred and saw the entire transaction, who without substantial variance testified that the defendant's car as it approached the intersection and up to the very instant of the collision was running at a speed of between 30 and 50 miles an hour. It appears that Central boulevard at the place where it crosses Leavenworth street is one of the main-traveled streets of the city of Omaha, and is extensively used by persons driving automobiles; that Leavenworth street is also used by them as well as by all other kinds of conveyances. A number of the witnesses who resided within a few hundred feet of that intersection testified that there was no time of the day during business hours that both of those streets were not occupied by automobiles and other vehicles. It appears that, as the defendant's car approached the intersection, he discovered the presence of the automobile in which the deceased was riding; that he saw a collision was imminent, and, in order to avoid it, he turned his automobile to the left so as to pass behind the one in which the deceased was riding. This was the proper course for him to pursue, and accorded in all respects with the rules of the road. It also appears that when the driver of the car in which the deceased was riding, which was proceeding at a rate of speed not exceeding eight to twelve miles an hour, discovered the approach of the defendant's machine, he applied additional power in an attempt to get out of

the way and avoid a collision. This was the proper course for him to pursue, and in all respects accorded with the rules of the road. Notwithstanding all of this, the speed of the defendant's car was so great that, although he discovered the presence of the other car when he was from 150 to 200 feet distant from it, he was unable to avoid the collision, and struck the Wallace automobile at about the right hind wheel with such tremendous force that it was lifted off from the pavement, thrown into the air several feet, and, while it was going north when the collision occurred, when it again struck the pavement it was facing south. It was thrown from 20 to 25 feet in a northwesterly direction, and landed against a telephone pole at the edge of the curb, while the machine in which the defendant was riding, although it had a wheel broken by the impact of the collision, could not be stopped until it ran a distance of 152 feet, jumped over the curb, which was from ten inches to a foot in height, went across the sidewalk, and hung on the edge of a hole in a vacant lot on the left hand side of the street. At least two of the witnesses who were looking directly at the cars when the collision occurred, testified that the deceased, who was a man weighing over 200 pounds, was thrown into the air from 10 to 15 feet, and a distance of from 25 to 30 feet, and struck on his head on the pavement or curbstone, receiving such injuries that he almost instantly died.

It thus appears that the excessive, unlawful, negligent, and reckless rate of speed at which the defendant was driving his car as he approached the intersection of the boulevard and Leavenworth streets was the sole cause of the collision which resulted in the death of William Krug. It was claimed by the defendant that Wallace, who drove the car in which the deceased was riding, was guilty of contributory negligence in applying his extra power, or, in other words, in attempting to speed up, as some of the witnesses designated it, at the time of the collision. There is no merit in this contention, for the evidence is clear that Wallace, recognizing the danger, attempted in a proper

manner to avoid it, and, if he had not applied his extra power in order to move out of the way, the defendant's machine would have struck his automobile about the center, instead of striking it at or about the right hind wheel. At least two of the witnesses for the state who lived in the immediate vicinity of the intersection in question testified that they had observed the passing and running of automobiles upon both the boulevard and Leavenworth streets for many years, and that in all that time they had never seen an automobile running as fast as the one which the defendant was driving at the time the collision occurred. It is true that the defendant and some of those who were riding in the car with him testified that they were driving at a rate of speed not exceeding 12 to 20 miles an hour. But this testimony must give way to the physical facts shown by the result of the collision. It is utterly inconsistent with such results. Each of the machines with its load weighed something like 5,000 pounds, and the speed at which the automobile driven by the defendant was going was so great, and the impact was so powerful, as to lift the automobile in which the deceased was riding bodily into the air and hurl it the distance of from 20 to 25 feet; not only this, but to completely reverse its direction, so that when it landed against the telephone pole it was facing south, while at the time of the collision it was moving and facing north. The testimony of the defendant and those riding with him serves but to illustrate the axiom of the law of evidence that officers and crews of respective vessels or vehicles where collisions have occurred will defend the vessels to which they are attached. It seems to be a curious psychological fact that, when passengers are aboard of a vessel or other means of conveyance, they appear to be controlled by the same bias. 2 Moore, Facts, sec. 1110.

6. Finally, it is contended that the court erred in excluding the evidence offered by the defendant to prove that McCormick, the friend of the deceased, who sat at his left side in the rear seat of the Wallace car, said within

a minute or so after the collision: "I told the damn fool to look out." It is claimed that this was a part of the *res gestæ*, and was therefore admissible as tending to prove that the driver of the car in which Krug was riding was guilty of contributory negligence. What we have heretofore said in regard to that question is a sufficient answer to this assignment.

We are aware of the importance of our decision of this case, both to the defendant and to the public. The questions presented by the record are before us for the first time, and we have examined them with great care. We recognize the necessity, utility and convenience of the automobile as a means of travel, and it is neither our purpose nor our desire to unnecessarily hamper or restrict its reasonable use. On the other hand, we deem it our duty to hold the persons who make use of such machines to that degree of care necessary for the protection of the lives of all persons who are rightfully upon the public highways and streets of our state. The statute regulating the use of such machines was passed solely for that purpose, and amounts to a valid exercise of the police power of the state. This view accords with the great weight of authority. In Berry, *Law of Automobiles*, sec. 159, it is said: "One may be criminally responsible for the negligent operation of an automobile. A person is guilty of criminal negligence when he does some act or omits some duty under circumstances showing an actual intent to injure, or when the breach of duty is so flagrant as to warrant an implication that the resulting injury was intended; that is, when his negligent conduct is incompatible with a proper regard for human life. Negligence is the gist of the offense, and, in the absence of recklessness or of want of due caution, there is no criminal liability. Actual intent is not an essential element of the offense. It is enough if there is shown a neglect and reckless indifference of the lives and safety of others." The evidence contained in the record conclusively establishes a case of negligent and reckless indifference to the lives and safety of others on the part of

Lamoresaux & Peterson v. Phelan, Shirley & Callahan.

the defendant sufficient to sustain his conviction and justify the judgment of which he complains.

We find no reversible error, and the judgment of the district court is

AFFIRMED.

LAMOREAUX & PETERSON, APPELLANTS, V. PHELAN, SHIRLEY & CALLAHAN, APPELLEES.

FILED APRIL 8, 1911. No. 16,368.

1. **Contracts: ACCEPTANCE.** Where an offer is made by A and accepted by B with the further agreement that B shall at once proceed to examine the subject matter of the contract to ascertain whether it corresponds with the representations made and shall immediately notify a designated employee of A whether he will accept the contract, notification to that effect to the proper person before a withdrawal of the offer and within the time contemplated by the parties will constitute a meeting of the minds and will close the contract.
2. ———: **RESCISSION: MISTAKE.** Where, after its acceptance, a party seeks on the ground of mistake to be absolved or released from an offer to contract, the fact concerning which the mistake was made must be material to the transaction, and of such a nature that, if the real facts had been known to him, he would not have made the offer. If the mistake was with reference to some fact not essential to the terms of the contract, or if it is not of such a nature that the conduct of the offering party was really determined or controlled by it, or if he would have made the offer even if the fact had been known to him, then he is not entitled to any relief on the ground of mistake.
3. ———: ———: ———. Where an offer was made by one partner to enter into a contract with another person to remove earth at a stipulated price per cubic yard, extending over several miles of a line of railroad in process of construction, the fact that before the offer was made another partner in the firm had already let a contract for a small portion of the offered work, which fact was unknown to the partner making the offer, does not necessarily constitute a mutual mistake between the parties to the contract.
4. ———: ———: ———. Evidence examined, and *held* that under the circumstances in this case the defendants are not entitled to be relieved from their offer on the ground of mistake.

Lamoreaux & Peterson v. Phelan, Shirley & Callahan.

5. ———: **ACCEPTANCE.** An offer was made in Omaha by a firm of railroad contractors to another firm engaged in the same business to let them a contract to do a large amount of grading in Montana involving the removal of nearly 600,000 yards of material at a stipulated price per yard, which offer was accepted with the condition that the firm to which the work was offered should at once examine the proposed work to ascertain whether it corresponded with the representations made, and should immediately notify a designated employee at the place where the work lay whether the firm would accept the contract. A member of the latter firm at once went to Montana for this purpose. Before the examination was made, he was informed by this employee, who had no authority to vary or modify the terms of the offer, that a portion of the work containing about 15,000 yards had been let to other parties before the offer was made, to which he replied in substance that it was a small matter and made no difference. He then told this employee that the work was as represented and that his firm accepted. *Held*, first, that the inclusion of the portion of the work which had been previously let was not an essential element in the making of the contract, and that the notice to the designated employee that his firm accepted and would do the work was an unconditional acceptance of the offer made.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Reversed.*

D. W. Merrow and J. W. Woodrough, for appellants.

Mahoney & Kennedy, contra.

LEITON, J.

This is an action for loss of profits arising from the alleged breach by defendants of a grading contract. At the close of the testimony in behalf of plaintiffs, the defendants moved for a directed verdict on the ground that the evidence was insufficient to establish the existence of a contract. The motion was sustained, and a judgment of dismissal entered, from which plaintiffs appeal.

The firm of Lamoreaux & Peterson is composed of Albert A. Lamoreaux and Edward Peterson. The members of the firm of Phelan, Shirley & Callahan are Ed-

Lamoreaux & Peterson v. Phelan, Shirley & Callahan.

ward Phelan, Michael Shirley, and William Callahan. Both parties are railroad contractors. In March, 1907, defendants held a contract to do a large amount of grading upon the Pacific coast extension of the Chicago, Milwaukee & St. Paul Railway Company in Montana. On March 28, 1907, a conversation was had in the office of plaintiffs in Omaha between Messrs. Lamoreaux & Peterson and Michael Shirley of the defendant firm. Plaintiffs' account of this conversation is in substance that at that time Shirley produced two profiles, one showing a section of work west of Forsythe, Montana (hereafter referred to as the west work), containing approximately about 400,000 yards of material to be removed, the other profile covering what will hereafter be designated as the east work. Shirley at first proposed to let a contract for the west work, but, upon being told more work was wanted, he said there was about 200,000 yards on the east work which they could have. An extended conversation took place with reference to the width of the cuts, the material to be removed, the quality of the water in that locality, the distance of the work from the town of Forsythe, and the condition of the roads for hauling supplies, also as to the price to be paid for moving the various kinds of material, which was fixed at 23 cents for earth work, 35 cents for hard-pan, 40 cents for loose rock, 55 cents for sand rock, 75 cents for solid rock, and 1 cent a yard for overhauling over 600 feet. Shirley also stated that the work must be done by November 1, 1907. In the profiles produced by Shirley, the line of railroad grade is marked with numbers at distances of 100 feet, which are known as stations. The profile of the west work included 162 stations. Shirley marked the profile of the west work at station 8,010, and said that he wanted to let all of the work from station 8,010 to the west end of the profile, station 7,390, and station 8,613 to station 2,159 on the profile of east work. Plaintiffs testify that they then accepted the offer with the reservation that Peterson should go to Montana that night to

Lamoreaux & Peterson v. Phelan, Shirley & Callahan.

the work, and it was agreed that, if he found it wanted by Mr. Shirley, he was to notify George , who was the foreman of Phelan, Shirley & at Forsythe.

be well at this stage to examine the pleadings making of a contract. The petition alleges the f the offer, alleges its acceptance by the plaintiff (plaintiffs) reserved the privilege of first visit-portion of the roadbed to be so graded with the ending that, if the work was such as defendants ed it to be to plaintiffs, the plaintiffs were to e defendants' agent then upon or in charge of ts' business on said portion of said roadbed, on the said contract for doing said work was to absolute and binding upon the parties plaintiffs ndants." It further alleges that on April 1 the s notified as had been agreed upon, "and there: contract became absolute between the parties ing on them."

nswer denies that the offer included all the ned in the petition, and alleges that defendants a oral proposition to the plaintiffs to sublet to ntiffs the grading of stations numbered 7,400 to * * at the prices stated in the petition of plain- i'condition that the plaintiffs should inspect said id immediately upon such inspection telegraph ts from Forsythe, Montana, an acceptance of osition," and afterwards agree upon the details tten contract setting forth the terms of the con- l the specifications for the work. It further al- That before said offer was made to plaintiffs by idants one of the members of the defendant firm et to another party stations numbered 7,925 to aid subletting was not known to the member of idant firm who made the aforesaid offer to plain- he time said offer was made, but after said offer le, and before the member of the plaintiff firm had made an examination of said work or had

signified any purpose to accept the aforesaid offer, said member of plaintiff firm was notified and informed of the fact that said stations had been sublet to another party." It pleads this was a withdrawal of the whole offer, and further denies the acceptance of any proposition, and that any contract was ever agreed upon. The reply is practically a general denial.

Returning to the testimony: Peterson left for Montana that night, taking with him another railroad contractor named Nicholson. He reached Forsythe on Saturday. Callahan of the defendant firm had a grading camp about 17 miles east of Forsythe. The east work was about two miles east of Callahan's camp. Peterson went to the camp, and on Sunday morning he, Nicholson, and Campbell started to drive to the west work, which was a distance of about 30 miles west. On the way Campbell told him that the work from 8,010 to 7,965 had been let to another party. Peterson said: "That did not make any difference about that little piece of work; didn't amount to nothing anyhow." The weather was inclement and the roads were muddy, so they turned back and went to look at the east work. While examining it, Campbell told Peterson there was another mile of work east of it they could have if they wanted it, which had been let to other parties who were not able to complete it. The next day they examined the west work, and after doing so Peterson told Campbell the work was "good work and just as Mr. Shirley had represented," and they "would take it." They then went to see the engineer in charge of the work, and Peterson arranged with Campbell to have a well dug and to furnish grain for the teams. When they returned, Campbell showed Peterson a telegram which had been received from Shirley, dated Omaha, April 1, reading: "Has Peterson taken work he looked at? Answer. Phelan, Shirley & Callahan." Peterson told Campbell to answer it at once, and went to the telegraph office at Forsythe with him. Campbell went in the room where the telegraph operator was. Peterson sent a

message to Lamoreaux. Nicholson and Peterson stopped at Billings, Montana, on their way home. They met Callahan at a hotel at that place. Callahan asked how the work was, and Peterson told him it was all right and just as Shirley represented it, and that he had arranged with Campbell to dig a well and deliver feed. They arrived in Omaha on the 4th of April. On that day a letter was received from Shirley, addressed to Lamoreaux & Peterson, dated at Aberdeen, South Dakota, on April 2. In substance this letter stated that he had received a telegram from Campbell saying Peterson liked the work and would sign up for it on his arrival in Omaha, also stating that they could have the work from station 7,925 to the west end of the profile; that at the time he told Peterson he could have the work from 8,010 west the work was let from 8,010 to 7,925; also stating the work would have to be completed before October 1, 1907, restating the price the same as in the oral conversation, and saying: "If you decide to do this work, you can ship at once and we can make contract when I get home to Omaha. * * * If you decide you don't want this work, wish you would please notify Mr. O'Hanlon at once on receipt of this letter at our office, or you can call him up over the phone, but I would like to have you do this work. I don't want you to wait until I get home for you to decide whether you want the work or not." On April 5 Peterson had a conversation with one O'Hanlon, an employee of defendants, at the defendants' office. After this conversation, and on the same day, plaintiffs sent the following telegram to defendants at Forsythe: "How much work can we have east of Callahan camp? Lamoreaux & Peterson." On the evening of the 5th a reply was received from Mr. Shirley at Forsythe, saying: "None east Callahan's camp. Do you want the other? Answer." In reply to this a night message was then sent by plaintiffs, saying: "We want and insist on having all the work agreed upon between us before Peterson left Omaha. Lamoreaux & Peterson."

Peterson testifies that his intention was by this to include as east work 8,613 to 2,519, and as west work 7,390 to 8,010, and that at the time he sent it he knew that 7,925 to 8,010 had been let before he talked with Shirley. At 3:25 on the afternoon of April 6, plaintiffs received the following telegram from Mr. Shirley at Forsythe: "We will hold work from 7,925 to 7,400 until 2 o'clock today." On April 8 plaintiffs received a telegram dated Forsythe, April 7: "You did not do as you agreed. Let work to another party. Phelan, Shirley & Callahan." This terminated the negotiations. The evidence further shows that the parties were acquaintances of long standing, and that plaintiffs had some time past performed a great deal of work under a subcontract for Phelan & Shirley in Iowa and Missouri without a written contract. It also shows that Callahan was in Omaha about March 30; that he at that time sent one O'Connor to Montana to look at work, and that O'Connor on April 8 contracted for a part of the work at a reduced price. It should be said that O'Connor testifies he was told that he was second, and that if the first parties did not take the work he could have it.

The sole question presented is whether the evidence makes a *prima facie* case showing the existence of a completed and binding contract between the parties. Assuming the facts to be as the plaintiffs testify, it is clear that the conversation in Omaha amounted to a proposal by Shirley and a conditional acceptance by Lamoreaux & Peterson. The plaintiffs' position is that, when Peterson told Campbell that the work was as represented by Shirley, was good work, and that they would do the work, this was an acceptance of the proposition and constituted a complete and binding contract. The defendants' position is, to quote from their brief, "that before Peterson had examined any of the work, either east or west, he was notified that a part of the work included in Shirley's proposition at Omaha had already been let to another party, and that upon that account defendants could not

let to the plaintiffs the identical work embodied in Shirley's proposition. In other words, he was notified that Shirley's proposition was withdrawn. This notice was reinforced by Shirley's letter from Aberdeen. What did Peterson say when he was told that stations 7,925 to 8,010 were already let, and that his firm could not have them? The only answer that he claims to have made was, as above shown; 'That did not make any difference about that little piece of work, didn't amount to nothing anyhow.' What does this answer mean? Does it mean that the fact that defendants had already let the work to another party makes no difference as to the rights of the plaintiffs, and that plaintiffs will insist that defendants break their contract with the other party and still give this work to plaintiffs, or does it mean that plaintiffs are willing to accept the remainder of the work without these 85 stations? * * * If it means * * * that plaintiffs will accept what remains of the work after cutting out these 85 stations, then it is not an acceptance of the identical offer made in Omaha, but is in the nature of a counter proposition, which is always a rejection of the original proposition."

It is also argued that the belief on the part of Shirley and the plaintiffs that it was within defendants' power to let 7,925 to 8,010 was a mutual mistake, and that no acceptance was made that did not include 7,925 to 8,010. Defendants have cited a number of authorities in support of the proposition that, if the acceptance of an offer is coupled with a condition which requires a counter acceptance, the minds of the parties do not meet and no contract is concluded. The proposition is elementary and requires no citation of authorities to support it, but it is not applicable here, because Peterson made no conditions when he told Campbell they would do the work. Did Peterson's acceptance and notification to Campbell close the contract? Plaintiffs were offered the contract to grade a definite section of track. They accepted subject to the privilege of examination and with the duty of

notifying Campbell of the acceptance. Before examination Campbell, who it is conceded by defendants was not vested with any authority to change or modify the offer or to do aught in the matter except to communicate to headquarters the fact whether Peterson accepted or rejected the proposition, told Peterson that a portion of the work had been let. Did this constitute a withdrawal of the offer before acceptance? The portion of the work spoken of was relatively small, about 15,000 yards, and it was not essential that it should be performed by the party contracting to do the other work. It was not like a portion of a building, a bridge, or other structure, work on a portion of which by others might be an obstacle to the proper carrying out of the contract. The proposed contract was to remove earth, rock, and other material to be paid for by the cubic yard. It could make no material difference to defendants whether plaintiffs removed the material on this section of the work or whether others equally reliable did so. The only thing of consequence to them was that they should be satisfied as to the persons with whom they contracted and as to the price, and since they had already made a contract with others these matters must have been satisfactory. Under these circumstances it could really have been a matter of little moment to them whether plaintiffs or Cartwright & Rumelhart held the contract for this portion of the work. They were apparently willing to deal with either. Moreover, the letter of Shirley from Aberdeen shows that the fact that 85 stations were let had no effect upon his mind with respect to the acceptance by plaintiffs of the remainder of the work. Defendants were still willing to allow the remainder of the west work to be done by plaintiffs for the same price.

These considerations apply likewise to the question of whether defendants were entitled to be relieved from their offer on the ground of mistake. Mr. Pomeroy says, speaking of the power of equity to relieve against mistakes: "The fact concerning which the mistake is made must be

Lamoreaux & Peterson v. Phelan, Shirley & Callahan.

material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief affirmative or defensive." 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 856. In *Grymes v. Sanders*, 93 U. S. 55, Mr. Justice Swayne says: "A mistake as to a matter of fact, to warrant relief in equity, must be material; and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." See, also, 1 Page, Contracts, sec. 155.

Again, subject of course to exceptions, it is a general rule that an offer to contract can only be revoked or withdrawn by one vested with authority to do so. Under the facts in this case, so far as the plaintiffs were concerned, unless the offer had been withdrawn either by a member of the defendant firm or by some one authorized to act for them with respect to the proposal, the contract was closed when it was unconditionally accepted by Peterson. Suppose that after this acceptance, accompanied as it was by the arrangements made with Campbell for the digging of a well and for the furnishing of grain and hay, plaintiffs had refused to perform the contract, and defendants had been obliged to employ others at an increased compensation to do the work, could the plaintiffs (especially after having stated that the fact of the previous letting of the 85 stations made no difference) be heard to say that they had not accepted, or that the offer

had been withdrawn before they accepted it? We think not. Two answers could be given to such a claim: First, that Campbell had no authority to modify or change the terms of the offer, and consequently the acceptance bound both parties (1 Parsons, Contracts (5th ed.) sec. II, p. 480 *et seq.*; 1 Addison, Contracts, p. *40); and, second, that after plaintiffs knew the facts they accepted, and at the same time waived their right to damages. We are of the opinion that, when Peterson notified Campbell that his firm would do the work, it was an acceptance of the offer; that waiving their right to the section let to Cartwright & Rumelhart was not a counter proposal; and that the contract was closed by such acceptance. To hold otherwise would be to permit the defendants to take advantage of their own mistake in an unimportant matter to relieve themselves from their offer. We also think that it was not a mutual mistake, as defendants' counsel maintain. It was the failure of one partner to inform the others of his own action.

The evidence which has been narrated of events following the acceptance of the offer really has no bearing upon the question now considered, except as it may furnish light respecting the truth of the testimony. As to the conclusion to be drawn from the facts, plaintiffs insist that the sinister inference may be made that defendants deliberately broke the contract upon ascertaining that the work could be let at a lower price, while defendants maintain that, among other evidence, the letter of Mr. Shirley shows an earnest desire to have plaintiffs enter into a contract, and that it was the intention of both parties that a written contract should be made before it was effective. With these matters at this stage of the case we have nothing to do, since we find that by the acceptance by Peterson the minds of the parties met and the contract was closed. This, in connection with evidence as to loss of profits, was sufficient to make a *prima facie* case to go to the jury.

We are therefore of opinion that the learned trial court

Davison v. Land.

erred in directing a verdict for the defendants. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

SOLOMON DAVISON, APPELLEE, V. GEORGE A. LAND,
APPELLANT.

FILED APRIL 8, 1911. No. 16,382.

Trial: DIRECTING VERDICT. At the conclusion of the plaintiff's evidence, plaintiff and defendant each moved the court for a directed verdict. Defendant then asked to withdraw his motion and to be allowed to introduce evidence. This request was refused, and a verdict directed for plaintiff. *Held*, That in such case prejudicial error will not be presumed, and the judgment of the district court will be affirmed under section 145 of the code, where the record does not disclose any facts showing that defendant suffered any prejudice or that he had a substantial defense to the action.

'APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Affirmed*.

J. L. White, E. P. Pyle and L. M. Graham, for appellant.

C. H. Tanner and Perry, Lambe & Butler, contra.

LETTON, J.

This is an action for damages for the tearing down of a portion of a line fence by the defendant. The answer was a general denial. A number of witnesses were examined on behalf of plaintiff. The evidence tended to prove that defendant interfered with and damaged the fence, and that the cost of necessary repairs would not exceed \$1.50. When plaintiff rested, defendant moved

Meyer v. Perkins.

for an instructed verdict in his favor. Plaintiff also moved that the jury be instructed to return a verdict in his favor. Defendant then asked to withdraw his motion for an instruction, and to be allowed to call a witness in his own behalf. This request was refused, and the court announced it would instruct for plaintiff. The jury were thereupon instructed to return a verdict for plaintiff for his actual damages, not exceeding the sum of \$1.50. Exceptions were taken to these proceedings, a motion for a new trial filed and overruled, and judgment rendered on this verdict.

The defendant complains of the refusal of the court to permit him to withdraw his motion and introduce testimony. Where parties each request a direction to the jury for a verdict in their favor, they submit the case to the court upon an issue of law. *Segear v. Westcott*, 83 Neb. 515; *Dorsey v. Wellman*, 85 Neb. 262. Where a party seasonably desires to withdraw such a request and to introduce evidence, the court should allow it to be done. It is elementary, however, that error will not be presumed, but must affirmatively appear. The record does not disclose any facts showing that the defendant suffered any prejudice by the ruling. We are not informed as to the nature of the evidence he desired to introduce, or as to whether it would constitute a defense. Under the circumstances of this case, we cheerfully apply section 145 of the code and affirm the judgment of the district court.

AFFIRMED.

HERMAN MEYER, APPELLANT, v. CHARLES PERKINS,
APPELLEE.

FILED APRIL 8, 1911. No. 16,354.

Fences: DIVISION FENCES: ESTABLISHMENT BY AGREEMENT. An oral contract between the owners of coterminous tracts of real estate that a hedge fence theretofore planted by one of them practi-

Meyer v. Perkins.

ing line between their farms shall be a
e proprietor shall own the northern half
or and repair it and the other shall own,
he other half, after the agreement has
rved for more than ten consecutive years,
rties thereto and such of their successors
thereof.

L. After the hedge has been divided,
a right to remove his portion, except
of December and the first day of the
ter having given the 60 days' notice pro-
, art. II, ch. 2, Comp. St. 1889, unless he
he hedge with some other lawful fence.

FENCE. In the event that a hedge thus
vn so as to interfere with the use of the
ie respective parties cannot agree con-
of the hedge, they should submit their
viewers to make an order regarding the
the hedge may be trimmed and main-
wfully made, that order will bind the

ION: INJUNCTION. A court of equity has
unlawful destruction of a hedge fence.

strict court for Lancaster county:
DGE. *Reversed.*

lant.

itra.

enjoin the defendant from tres-
's land, and from cutting, destroy-
rt of a hedge growing, as alleged,
close to the boundary. The de-
the plaintiff appeals.

an planted an Osage orange hedge
i but a few inches east of the
the land now owned by the
at time made no claim to the

land west of his hedge. In 1889 Mr. Chapman's son-in-law, Perkins, the defendant herein, purchased the land immediately west of Mr. Chapman's land. In 1900 the plaintiff purchased the Chapman farm. The defendant four months after his purchase entered into an oral contract with Mr. Chapman, by the terms of which Perkins was to maintain the south 80 rods of the hedge and Chapman the northern 80 rods thereof. Both of these parties testify that Perkins from thenceforward cared for the southern half of the hedge, that it was their understanding that he became the owner thereof, and that the hedge at all times has been regarded as the dividing line between the respective farms. The testimony of these witnesses is not altogether satisfactory because given in part in response to leading questions, but, taking all of the testimony on this point and the evidence of the conduct of Chapman and Perkins, we conclude that an agreement was made for a division of the hedge fence, and that Chapman waived his right to compensation under the statute. The effect of this agreement and the conduct of the parties thereto for the 11 years intervening between that date and the time Chapman sold his farm to Meyer was to vest in Perkins title to the south half of the hedge burdened with all of the duties which the laws casts upon the owner of a part of a division fence. The plaintiff contends that the hedge is a part of his real estate, that no interest could or can be created therein, except by a writing sufficient to convey title to or an easement in the land, and that the contract between Perkins and Chapman does not bind the plaintiff because at the time of his purchase he had no notice that Chapman had incumbered the farm with an easement in Perkins' favor. At the time the hedge was planted, article II, ch. 2, Comp. St. 1889, was in force. Section 2, art. II, *supra*, provides that the owners of coterminous tracts of real estate shall each make and maintain a just proportion of a division fence, unless they or either of them elect to let their or his lands lie open. Section 3 provides: "When any per-

son shall have chosen to let his lands lie open, if he shall afterwards enclose the same, or if the owner of lands adjoining upon the enclosure of another, shall enclose the same upon the enclosure of another, he shall pay to the owner of the adjoining lands a just proportion of the value, at the time, of any division fence that shall have been made by such adjoining owner, or he shall immediately build his proportion of such division fence." The value of the fence and the amount one owner shall contribute, if not agreed to by the parties, is to be settled by fence viewers who are to be selected from the justices of the peace in the county.

Section 10, art. II, *supra*, provides that any person who shall have made his proportion of a division fence may remove the same between the 1st day of December and the 1st day of the following April by giving 60 days' written notice to the other party in interest. While the statute provides a procedure for ascertaining and fixing the rights and duties of cotermious proprietors with respect to a division fence, it is not exclusive, but they may by contract adjust their respective rights and obligations. The authorities are conflicting as to whether a contract of that character is within the statute of frauds. Respectable authorities hold to the contrary. *Guyer v. Stratton*, 29 Conn. 421; *Baynes v. Chastain*, 68 Ind. 376; *Ivins v. Ackerson*, 38 N. J. Law, 220; *Henry v. Jones*, 28 Ala. 385; *York v. Davis*, 11 N. H. 241; *Blood v. Spaulding*, 57 Vt. 422; *Walker v. McAfee*, 82 Kan. 182, 27 L. R. A. n. s. 226. Perkins by electing to use the hedge to enclose his field became liable to Chapman for one-half the value of that fence, and the fact that Chapman was willing to waive that compensation in consideration of their relations and of Perkins' agreement to maintain the south half of the hedge cannot concern a subsequent purchaser. Meyer knew at the time he purchased the farm that the hedge was and had been for years a division fence; he knew that Perkins became liable for contribution many years preceding the time Chapman transferred the farm;

Meyer v. Perkins.

he also knew, or should have known, that no award of compensation for Mr. Chapman and no report of a division of the fence had been filed in the office of the county clerk, and that therefore there probably was an existing contract, possibly in parol, between Chapman and Perkins with respect to that subject. The hedge must have attained such dimensions at the time of the plaintiff's purchase that he knew, or should have known, that it had been growing many years, so that, if Perkins' interest therein should be considered an easement in the Chapman farm, it was open and notorious, so as to put Meyer upon inquiry. *Arterburn v. Beard*, 86 Neb. 733. The plaintiff testified in substance that he did inquire of Mr. Chapman, and was told that the hedge all belonged to him, but no inquiry was made of Mr. Perkins. In the light of the facts in this case, it is immaterial whether the contract was oral or written. It has been executed and acted upon for more than ten years, and the situation and condition of the hedge gave ample notice of Mr. Perkins' rights. But, while the defendant acquired an interest in the hedge, he did not have a right to destroy or render it valueless for the purposes for which it was planted. Perkins, when restrained, had cut the hedge trees flush with the earth, or nearly so, for a space of 30 rods, and, until the sprouts shall grow and attain a considerable size, the hedge at this point will not perform its office as a division fence. We do not think the defendant should be thus permitted to work his will. If, as he argues, the hedge had grown so as to shade and render useless for agricultural purposes a strip of valuable land, and good husbandry dictates that the hedge should be trimmed and restrained within more narrow bounds than it now occupies, and he cannot agree with the plaintiff as to the extent of that trimming, we are of opinion that he should call upon the fence viewers to fix those limits. Section 29 of the original fence law (Rev. St. 1866, p. 10) provided: "Any structure or hedge, or ditch in the nature of a fence used for the purposes of en-

Meyer v. Perkins.

rich is such that good husbandmen generally be deemed a lawful fence." The act of February 7 (Comp. St. 1889, ch. 2, art. II, sec. 18) defines a lawful fence, whether rail, board, rail and post, post, or wire. This act deals with the dimensions, including Osage orange hedge. The prohibition 3 of said act that an Osage orange hedge shall be such as the fence viewers shall decide to be" in our judgment vests the fence viewers with authority to adjust any differences that may arise between the owners of a division hedge fence, and to make an order concerning the limits within which it may be so as to conform as nearly as may be to the dimensions described in the statute. If Perkins proposed to substitute for his half of the hedge any other fence, we are of opinion that he had the right to do so. He does not contend that he intended to substitute a fence for the hedge, but pleads and testifies that the hedge trees flush with the earth would immediately grow up to the height of the fence. While this might be the fact if sufficient time were allowed for the hedge to grow, we do not think that the plaintiff should be deprived of a fence during that

time. The defendant argues that the plaintiff should have applied to the fence viewers, and not to the courts; but, the fact that the defendant was rapidly destroying the hedge and did not propose to substitute a fence, an order made by the fence viewers would be ineffectual and would not furnish an adequate remedy. The court restrained the unlawful destruction of a hedge. *Meyer v. Perkins*, 18 Neb. 299.

We do not think that the plaintiff has any such an interest in the severed hedge trees as to entitle him to a judgment for their value, but if the defendant did not comply with an order in accordance with the fence law, or if he does not intend to immediately replace the hedge with a fence, the plaintiff is entitled to a judgment restraining the further unlawful destruction of the hedge,

White v. Slama.

and, upon proper averments, for such damages as he may have suffered by the absence of a fence between the litigants' farms. There is no proof that the fence law was observed by the defendant, and a consideration of the entire record induces the belief that it was ignored by him. We do not care to make a finding to that effect, but shall permit the parties to make proof of the facts by granting a new trial. If it shall then appear that the fence law has not been observed by the defendant, or that he did not intend to immediately construct a lawful fence in place of the hedge, he should be enjoined from further unlawfully cutting down the hedge trees.

The judgment of the district court therefore is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

PETER P. WHITE, APPELLEE, v. CHARLES H. SLAMA,
APPELLANT.

FILED APRIL 8, 1911. No. 16,786.

1. **Elections: ELECTORS: RESIDENCE.** If a man whose family resides in a foreign country or in a sister state comes into Nebraska temporarily for the purpose of working upon a railway, and while engaged in that vocation boards in a box car which is moved from station to station according to the directions of his superintendent, and as his work progresses, and immediately after the work is completed departs from the community, and while there performs no act other than to vote, nor makes any statement tending to prove an intention to acquire a residence in this state, he is not a resident within the meaning of section 1, art. VII of the constitution, nor an elector, notwithstanding the car in which he boards may have remained on a side-track in a voting precinct during the greater part of four months next preceding the election.
2. ———: **ILLEGAL VOTES: CIRCUMSTANTIAL EVIDENCE.** Circumstantial evidence is competent to prove which candidate received the benefit of illegal votes cast at an election.

3. ———: MARKED BALLOTS. A ballot should not be treated as void solely because it is marked in a peculiar manner; but, if the voter's intention can be ascertained from an inspection of the ballot, it should be counted in accordance with that intent.
4. ———: ———: PRESUMPTIONS. Ordinarily, in the absence of extrinsic evidence, the court will not presume that an irregularly marked ballot was thus prepared for the purpose of identifying the elector.
5. ———: ———. A ballot marked solely with a line or combination of lines wholly within a party circle should be counted for the candidates of that party, if there is no evidence that the lines were traced for the purpose of identifying the ballot.
6. ———: ———. A ballot marked with a well-defined cross within a party circle should not be rejected because of marks without that circle which extend into another party circle, where it appears from all of the lines that the elector intended the cross to evidence his vote.
7. ———: REJECTED BALLOTS. Where no more ballots are cast than the number of electors voting, and upon a recount one of those ballots is found in an envelope marked by the election board "rejected," and transmitted under their seal as part of their record to the county clerk, but neither the ballot nor the envelope is marked "spoiled" or "unused," and it appears probable from the testimony that the ballot was thus segregated from the other ballots by mistake, it should be counted, if fair on its face and not impeached by any fact or circumstance appearing in the evidence.

APPEAL from the district court for Saunders county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

O. B. Peterson, B. E. Hendricks and Simpson & Good,
for appellant.

E. P. Smith, J. H. Barry and H. Gilkeson, contra.

ROOT, J.

This is an appeal from an order of ouster entered in the district court in proceedings instituted to contest the incumbent's title to the office of county judge of Saunders county. The district court found that White, the con-

testant, received 2,029 and Slama, the incumbent and contestee, 2,009 legal votes. The contestee argues that 36 votes cast for him were not counted and 9 too many votes were counted for the contestant.

We will first consider the alleged illegal votes which the court deducted from the incumbent's vote as canvassed and returned from Union precinct. The proof shows that in April, 1909, 25 Italian laborers came from Chicago to Ashland, in Saunders county, and during the spring and summer worked upon the railway between Ashland, Nebraska, and Sioux City, Iowa. During the warm weather these men cooked their meals and ate and slept out of doors; in cold or stormy weather they boarded and slept in five box cars, which were moved from station to station according to the order of their foreman. None of these men were within the state prior to April, 1909; some of them were married, but, so far as we are advised, their families were in Italy or in Chicago. Six of the men testified in this case, and it unequivocally appears that they are not and never have been citizens or residents of Nebraska, and that at least four of them have not declared their intention to become citizens of the United States. The box cars just referred to were switched upon the side-track at Yutan, in Union precinct, about the 17th of June, 1909, and there remained most of the time intermediate that date and October 29, upon which day the cars and the men were transferred to Fremont, in Dodge county, where they remained until the evening of November 1, at which time they were brought back to Yutan.

In the forenoon of November 2, election day, the Italians worked upon the railway grade, destroyed garbage that had accumulated in the neighborhood of the cars during the preceding weeks, and burned discarded railway ties. The preceding evening a Mr. Schulze, a saloon-keeper who affiliates with the republican party, stored two kegs of beer in a local merchant's ice chest for the use of these men; in the forenoon of November 2

Tony Caliendo, interpreter and time-keeper for the Italian workmen, and Mr. McDermot, their boss, who also affiliates with the republican party, conferred with Schulze. At this meeting Caliendo was told to take sample ballots, which were furnished him by Schulze, and instruct the Italians to vote by making a cross in the second party circle, which would, if received by the election board, cast a vote for all of the republican nominees. Caliendo took the ballots, interviewed all of the Italians at the boarding cars, gave every man a sample ballot containing a cross in the republican party circle, and told him how to vote. Between 12 and 1 o'clock the 25 Italians, including Caliendo, in company with McDermot, went in a body to the polls and voted while the democratic judge of election was absent for dinner. In the afternoon of that day the Italians consumed the beer provided by Schulze for their benefit, engaged in various amusements, and about 6:30 o'clock the following morning departed from the county, to which none of them, with the exception of Caliendo, have since voluntarily returned.

About the 1st of January, 1910, seven of these men were arrested for violating the election laws, and subsequently six of the prisoners testified for the contestant. Caliendo stated the facts in substance as we have detailed them, and said that he voted a ticket marked in the second circle; the other five Italian workmen testified in substance that they were instructed how to vote by Caliendo, and were given sample ballots marked in the second party circle, and that they voted an official ballot marked in that manner. One Italian under arrest was in Wahoo, the county seat of Saunders county, at the time of the trial, but was not called as a witness; the remainder of the 25 laborers had dispersed to points unknown to the contestant. The proof further shows beyond question that one of the Italians signed his name upon the back of the official ballot received and cast by him. This ballot is in evidence and bears a cross mark in the republican party circle. The contestant received but 39 votes in Union

precinct; 38 legal voters were called as witnesses, 29 of whom testified to having voted for White, but 9 claimed privilege and refused to state for whom they voted. Two hundred persons voted in Union precinct; the incumbent received 154 votes, which, added to the 29 votes shown to have been cast for the contestant, leaves 17 votes unaccounted for. Upon the foregoing state of facts, the contestee contends that there is not sufficient proof that the Italians not interrogated as witnesses were not lawful electors of Saunders county, nor that all of them voted for him.

Whether an individual asserting the right to vote has established a residence within the meaning of section 1, art. VII of the constitution, is a judicial question. *Berry v. Wilcox*, 44 Neb. 82. But there is no absolute criterion by which to determine that fact. In *Berry v. Wilcox*, *supra*, it is said: "One's residence is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove." In the case at bar these laborers had no boarding place other than the box cars, but they could have entertained no thought that Yutan, more than Ashland, Fremont or any other station upon the line of railway, was the point to which they expected to return when, in obedience to orders, they shifted from one locality to another upon the line of the railway, nor did they have any control over the movements of these cars; all of their tools and personal effects were removed with them October 29, when they rode to Fremont, and if their foreman had not, in obedience to directions from his superior, ordered the cars returned to Yutan, these men would not have returned to Union precinct.

We are unable to discover a single element, other than the bodily presence of these men in Union precinct on the day of election and their age, tending to establish their qualifications to vote at the election in question. On the

other hand, we think the established facts and the deductions which a court should draw from other facts appearing in the evidence not only justify, but imperatively require, a finding that they were not qualified electors. *People v. Teague*, 106 N. Car. 576; *Howard v. Skinner*, 87 Md. 556, 40 L. R. A. 753; *Sorenson v Sorenson*, 139 Ill. 179. McDermot, the foreman of these men, was unmarried and resided in Fremont; he also voted at the election. The evidence discloses that he registered in Fremont as a republican and affiliates with that party.

Having found that the votes were illegal, the next inquiry is whether the evidence will justify a finding that they were cast for Judge Slama. The voter is in the best position to know for whom he voted, but circumstantial evidence is competent to prove that fact, and where the facts and circumstances from which the finding is made are clearly established, and the inference is the only one which can fairly and reasonably be deduced therefrom, the court should not hesitate to act upon circumstantial evidence and therefrom find the ultimate fact. *Western Travelers Accident Ass'n v. Holbrook*, 65 Neb. 469. The testimony of Caliendo and of the other Italian witnesses is uncontradicted. So, also, is the testimony of the other witnesses concerning the facts connected with the voting of these men. McDermont is silent; Schulze does not appear; the local republican committeeman, who was present when these men voted, does not testify; and not one of the many suspicious circumstances appearing in the evidence are in any manner explained by the contestee. Some of these circumstances, if segregated from the others or skilfully arranged in groups, may seem inconclusive, but when weighed separately and compared as a whole, giving to each due weight, in combination they constitute convincing proof. In this connection we quote the language of Mr. Justice Clifford, reported in *The Slavers*, 2 Wall. (U. S.) 383, 401: "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by

moral coincidences, be sufficient to constitute conclusive proof." And so it seems to us an application of the rule to the facts in the case at bar permits but one conclusion, and that is that these illegal votes were cast for Judge Slama.

In considering the argument that some of these ballots may have been cast for the contestant, and that there is no proof that the Italians voted straight ballots, it may be said that these men did not vote for candidates or for individuals; they had no comprehension of the elective franchise, but were following orders to put a cross in a definitely described circle. If that act, in connection with depositing the ballots in the ballot box, counted for Judge Slama, well and good; if for the contestant, Mr. White, they would have been in no manner disappointed or disturbed. We entertain no doubt that the mark was inscribed in the second circle upon every one of the 25 ballots cast by the Italian laborers. *Sorenson v. Sorenson*, *supra*; *Rexroth v. Schein*, 206 Ill. 80; *Widmayer v. Davis*, 231 Ill. 42; *People v. Teague*, *supra*; *Black v. Pate*, 130 Ala. 514. The fact that one Italian within the jurisdiction of the court was not called as a witness is an exculpatory circumstance, but it does not destroy the probative value of all the other undisputed facts and circumstances appearing in the record with respect to the issue under consideration. There is no proof in the record that Judge Slama was responsible for the conduct of these Italian laborers, and counsel for the contestant, at the bar, disclaimed any such contention, but for the purposes of this case it is immaterial whether party organization or misguided personal zeal inspired this plain violation of the law. No court should permit a candidate to hold an office by virtue of such a fraud. While the evidence is not so strong that McDermot voted the republican ticket, we think it is *prima facie* sufficient. Notwithstanding what has been said, if the contestee is correct that he should have credit for 16 votes not counted by the court and that 9 votes counted for the contestant

White v. Slama.

should be deducted, the judgment of the district court should be reversed.

The ballot marked exhibit "N" contended for by the contestee should not be counted for him; there is no mark in any party circle upon this ballot, but a cross appears in the square opposite the contestant's name, and a cross was marked in the square opposite the blank line next below Judge Slama's name. If, as the contestee contends, the cross last referred to should be considered as if it were marked in the square opposite his name, a vote was cast for both the contestant and the contestee, and the ballot could not be counted for either. With this ballot eliminated, there remain 15 rejected ballots contended for by the contestee.

Among the nine ballots alleged to have been erroneously counted for the contestant are exhibits 4, D, F, and L. Exhibit 4 is marked solely with a horizontal line in the democratic party circle. Upon exhibit D appears a cross inclosed in an acute angle within the democratic party circle, and no other mark. Upon exhibit F lines were drawn through the names of both candidates, for county superintendent of public instruction and through the names of both candidates for assessor. The name "John Nelson" was written upon the ballot as a candidate for county treasurer, and a cross was marked opposite his name. A cross was also marked in the square opposite the contestant's name. Exhibit L was marked by several crosses within the democratic party circle. The marks upon all of these ballots are within a party circle. Section 146, ch. 26, Comp. St. 1909, among other things, provides that a cross in a party circle casts a vote for every candidate nominated by that party. Section 151, ch. 26, *supra*, also provides that, "when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, then it shall be the duty of the judges of election to count such part." This court has ever construed the Australian ballot law with great liberality, to the end that the voter's intent may be ascertained and given effect.

State v. Russell, 34 Neb. 116; *Spurgin v. Thompson*, 37 Neb. 39; *Bingham v. Broadwell*, 73 Neb. 605; *Griffith v. Bonawitz*, 73 Neb. 622. It seems plain to us that the electors in marking and casting these ballots intended to vote for Mr. White. The contestant, however, argues that exhibits D, F, and L, and exhibit 55, which will be later referred to, are so marked as to permit the identification of the electors who cast the ballots, and therefore should be rejected. No evidence of extrinsic facts was received or offered to suggest why the electors did not content themselves with marking a simple cross, instead of tracing the marks we find upon the ballots, nor do we know why those marks were made. If the evidence suggested that these ballots were thus marked for the purpose of advising a candidate or the public that any elector cast the particular ballot, we should exclude them. Unaided as we are by evidence other than the ballots, we shall not indulge in presumptions of wrongdoing, but shall count them for the candidate for whom they appear to have been cast. *Bingham v. Broadwell*, *supra*; *Griffith v. Bonawitz*, *supra*; *Gauvreau v. Van Patten*, 83 Neb. 64; *Bates v. Crumbaugh*, 114 Ky. 447; *Woodward v. Sarsons & Sadler*, 32 L. T. (Eng. 1875) 867, 872.

Upon exhibit 55 a cross was marked in the people's independent party circle; random lines were extended from outside to points within the prohibition party circle; a blur appears without, but close to, both of these circles, and lines were drawn from the blur so as to converge near the center of the cross in the people's independent party circle. No other mark appears upon the face of the ballot, except lines drawn by the election board canceling the names of the candidates in road district No. 13. The elector evidently did not believe that he had spoiled the ballot, but thought the election board could ascertain his intention therefrom. The district court construed the ballot as a vote for the contestant. While it is not clear that the elector intended to vote the people's independent party ticket, we are of opinion that the evidence preponderates in favor of the finding of the district court.

White v. Slama.

Exhibit 42 is a ballot from Oak Creek precinct, and was counted in favor of the contestant; it was found among other ballots in an envelope marked "rejected ballots" and returned by the election board. Neither the ballot nor the envelope was marked "spoiled" or "unused," as the statute requires in case an elector returns a ballot which by mistake he improperly marks. The elector did not make a mark within any party circle, but made a cross opposite the names of various candidates, including the contestant. None of these marks are within the squares, but are upon the leader running from the candidate's name to his party's name. The cross extends more above than below White's leader, and we think evidences the elector's intention to vote for the contestant. There was no excess of ballots cast in that precinct, nor did the district court by counting this ballot increase the vote as canvassed and returned by the local board.

This disposes of six of the nine contested ballots counted by the district court in the contestant's favor, and if all of the remaining ballots contended for by the contestee should be counted in his favor and those objected to by him should be rejected, and we do not determine that they should or should not be thus disposed of, the contestant would still have a majority of two. The contestee did not assign in his motion for a new trial any error because the court did not count exhibit 20 in his favor. Possibly this fact might justify us in ignoring this ballot, and, if we did so, the contestant's undoubted majority would be increased to three. If we should count the ballots as they appear in the record, ignoring technical objections with respect to practice, the contestant, rather than the contestee, would profit thereby. But, since sufficient has been found to sustain the judgment of the district court, it is affirmed without further comment.

AFFIRMED.

REESE, C. J., not sitting.

Miller v. Worth.

LETTON, J., concurring.

I concur in the opinion, but I am convinced that at least ten ballots counted for the incumbent by the election board should not have been counted for him.

I also think that the judgment of the district court as to two other ballots counted for White by that court, but not considered or awarded to him by the opinion, was correct and should be followed.

MARY MILLER, APPELLEE, V. JANE WORTH, APPELLANT.

FILED APRIL 8, 1909. No. 16,322.

1. **Deeds: CANCELATION: UNDUE INFLUENCE.** In equity a warranty deed may be canceled on proof justifying findings that it was a gift from grantor to her sister; that grantor was physically and mentally weak, and that grantee was strong both mentally and physically; that, in addition to their sisterhood, relations of trust and confidence existed between them in business affairs, grantor relying on her sister; that the deed deprived grantor's children of her property, and that these and other circumstances warrant the conclusion that the deed was procured by undue influence of grantee.
2. ———: **UNDUE INFLUENCE: RATIFICATION.** A deed procured by undue influence as a gift from a person who is weak mentally cannot be sustained on the ground of ratification, where a duly appointed guardian is insisting on a cancelation, and the evidence shows that grantee's influence over grantor has continued without interruption and that the latter has not improved mentally.

APPEAL from the district court for Cass county:
HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Matthew Gering, for appellant.

Byron Clark and W. A. Robertson, contra.

ROSE, J.

This is a suit to cancel a warranty deed to 80 acres of land in Cass county and two lots in the village of Murray. Mary Miller, plaintiff, was grantor, and her only sister, Jane Worth, defendant, was grantee. The conveyance included practically all of the property owned by plaintiff, but she reserved a life estate. She lived in a house on the lots and received an annual income of \$250 from the land. The suit was instituted by her next friend, John Murray, Jr. Later David J. Pitman was appointed guardian and substituted for her next friend. The trial court canceled the deed, and defendant has appealed.

The grounds on which plaintiff demanded relief were mental incompetency of grantor and undue influence of grantee. The pleadings put these facts in issue and the evidence was directed thereto. The question presented is: Under the evidence, should the deed be canceled? The testimony is far too voluminous for extended analysis in an opinion of reasonable length. It has all been examined with care, however, for the purpose of reaching the proper conclusion.

Plaintiff was 62 years of age at the time of the trial, and was then living with her second husband, Chris. Miller. Her only children, three daughters, were the issue of a former marriage with George Young. After the children grew up, their parents were divorced. Two of the daughters were married and had homes of their own. The other daughter lived with her father, who remarried and moved from his home in Cass county to Oklahoma. To meet plaintiff's proofs, defendant adduced testimony tending to show: After plaintiff was separated from her first husband she repeatedly told neighbors, friends and acquaintances that her daughters had taken the side of their father and had mistreated, neglected and abandoned her. She did not intend that they should have her property. Her sister had always stood by her and had treated her kindly and she intended to

give her property to her sister. To this end she had made three wills, but, fearing a contest, had voluntarily deeded her real estate to defendant, who had never done anything to turn plaintiff against her daughters or asked for the property. Many witnesses who had observed the conduct of plaintiff during recent years testified they saw nothing unusual in her behavior and expressed the opinion she was mentally competent to make the deed.

On the other hand, there is oral or documentary proof tending to show by direct statement or proper inference the following: Defendant lived on a farm near Pender, in Thurston county. Plaintiff went to visit her there in February, 1905, and returned to Murray in July of the same year. In the meantime plaintiff had been very ill. When she left home she was a large, corpulent woman. When she returned she was weak and emaciated and never recovered her health. According to her physicians, she had diabetes and was suffering from general neurasthenia. Protracted anxiety, grief, worry and excitement are disclosed by the evidence and are among the recognized causes of neurasthenia. Symptoms of this affliction, such as physical weakness, insomnia, loss of power to concentrate the mind, and fear, are also shown by the evidence, independently of the testimony of experts. A physician who treated her in 1905 expressed the opinion that she was incapable of attending to business. The deed was executed November 9, 1905. Plaintiff had previously confessed to her sister a belief in fortune-telling and they had gone together to have their fortunes told. When talking to her sister, defendant said a fortune-teller had told her she was going to get some property, but plaintiff's prospect was less hopeful, for she was cautioned that some one was trying to beat her out of her property; that he wanted it to invest, and if he got it he would beat her out of it. After plaintiff returned from Pender she repeatedly told neighbors and acquaintances of her experiences with fortune-tellers; that she believed in them, and that they had helped her. Some-

times when alone in her own house she would become boisterous and use violent language. At other times she would stand in her yard for a long time apparently distracted. She inherited from her father a violent temper. She denounced her children as undutiful, though there is nothing in the record to justify her antipathy for them. As early as July 25, 1901, defendant wrote to one of plaintiff's daughters a letter containing the statement: "Your ma's mind wasn't just right when she was here." It may fairly be inferred from the testimony that the attorney who drew the deed suspected at the time that "the old lady was off a little," as he expressed it. It is at least questionable whether the life estate reserved by plaintiff in her deed would have been sufficient for her support during protracted periods of illness.

While plaintiff was struggling with her unhappy lot and laboring under the infirmities described, her sister was an exceptionally vigorous, strong-minded woman. She transacted her own business. She attended sales, bought stock, accompanied shipments to the stock-yards, and sold her own cattle. On one occasion she addressed the supreme court in her own behalf in a case wherein she was a party. Plaintiff looked to her for advice, expressed herself as having great confidence in her, and frequently said the only relative she could depend upon was her sister. At Pender they frequently talked together about plaintiff's property. Plaintiff testified she asked her for it. Defendant admitted on cross-examination that plaintiff relied upon her when she was sick, and that she sometimes appealed to her for advice in business matters and that it was given. Plaintiff did not confide in her daughters when executing the wills and the deed, and in this regard she evidently respected the wishes of defendant. With the relations, circumstances and conditions in the situation described, defendant appeared at the home of plaintiff in Murray at 1 o'clock in the morning, November 9, 1905. The same morning at 9 o'clock H. Wade Gillis, with a supply of blank deeds,

Miller v. Worth.

also appeared at the request of defendant. He was unknown to plaintiff, and his office was at Tekamah in another county. He drew the deed in controversy at plaintiff's home, and promptly secured the services of a notary who took the acknowledgment there. Plaintiff was at the time weak, nervous and agitated. She signed her name "Mary Ung," instead of "Mary Young." At 1 o'clock P. M., the same day, the deed was recorded at Plattsmouth. Gillis was defendant's attorney and received from her \$25 for his services. He admitted on the witness-stand that he advised plaintiff to sign the deed. She did not have independent advice or counsel. The register of deeds immediately notified defendant at Pender of the error in grantor's signature. Defendant promptly returned to Murray, had the deed corrected, and went back to Pender on the first train.

The conveyance was a gift. The only consideration was correctly described in the deed as "love and affection." Plaintiff was decrepit, physically weak and at least mentally infirm. Defendant was strong, both mentally and physically. The evidence makes it clear that in business matters plaintiff looked to her sister for advice and relied upon her. In addition to their sisterhood, the relation between them was one of trust and confidence. It was defendant's accepted duty to advise her sister. Her obligation in that respect was the same, whether the relation of confidence grew out of a sense of sisterly affection or was officiously cultivated for mercenary ends. In either situation equity demands restitution for any abuse of confidence resulting in an undue advantage to defendant. Defendant was in a sensitive position when she accepted a gift which her attorney advised plaintiff to make. Haste and secrecy in so important a matter were not satisfactorily explained. Three wills had been made. Each new one increased the advantage of defendant, and the deed was more beneficial to her than any of the wills. The soothing influence of time and the approach of death did not restore the daughters to normal relations with

Burke v. Scheer.

their mother. Three years after the deed was executed plaintiff and defendant went together to a bank in Platts-mouth, and plaintiff then made a deposit in the name of "Mary Miller or Jane Worth." The explanation of this transaction was that it would permit defendant to draw the money, "if anything happened" to plaintiff. This act of business sagacity scarcely originated with plaintiff. An officer of the bank testified that defendant at the time said: "The children are trying to get the money away from Mrs. Miller." When all the circumstances are considered in connection with the relations of the parties and the mental and physical condition of plaintiff, there is convincing proof that the deed was procured by means of undue influence on the part of defendant. In this respect the finding here will be the same as that of the trial court.

Ratification by plaintiff is invoked to sustain the deed, but this position is wholly untenable. A duly appointed guardian insisted on a cancelation, and the evidence shows that defendant's influence over her sister continued, even after the guardian was appointed, and that plaintiff's mental condition did not improve. The evidence justifies the decree below.

AFFIRMED.

FRANK C. BURKE, RECEIVER, APPELLEE, v. R. SCHEER ET AL., APPELLANTS.

FILED APRIL 8, 1911. No. 16,326.

1. Insurance: INSOLVENCY: SUIT TO ENFORCE LIABILITY OF MEMBERS.

A single suit in equity cannot be maintained by the receiver of an insolvent mutual hail insurance company, organized under chapter 43, Comp. St. 1909, against all of the policy-holders of such insolvent company, for the separate liability of each policy-holder for unpaid assessments, whether levied by the directors of the company before insolvency, or by the court thereafter, on the ground that such single suit would prevent

a multiplicity of actions at law; nor can such a suit be maintained on the ground that it is ancillary or auxiliary to the main insolvency proceeding; nor upon the ground that the money when collected would become part of a fund that would be distributed under the direction of the court, since no question is involved in which the defendants have a common interest, and the suit is merely an aggregation of separate actions at law, each involving separate issues and having no relation to each other, except that there is a common plaintiff, and in each of which the remedy at law is adequate, and is the remedy pointed out by the statutes governing such companies.

2. ———: ———: ———: PROCESS. Nor can the receiver join in one action all policy-holders or members of such company who are severally liable for individual unpaid assessments, those who reside in counties other than the county where the suit is brought, as well as those who reside within such county, and issue summons to such other counties to obtain service upon such nonresidents.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed with directions.*

Hainer & Smith and G. F. Rose, for appellants.

E. P. Holmes and G. L. De Lacy, contra.

FAWCETT, J.

The Mutual Hail Insurance Society, a corporation organized under the provisions of "An act to authorize the organization of Mutual Hail Insurance Companies" (Comp. St. 1909, ch. 43), which for the sake of brevity will be designated the company, was, on February 19, 1908, by the district court for Lancaster county, adjudged insolvent, and plaintiff was appointed receiver. The court found the liabilities of the company to be \$13,277.95. There being no funds in the hands of the receiver with which to pay these liabilities, the court made an assessment upon the policy-holders of the company, 254 in number and residing in many different counties, of \$1.25 an acre for the number of acres covered by their several policies. The receiver was then instructed to bring suit

against all the policy-holders. Only three of the policy-holders were residents of Lancaster county. The receiver brought this suit in the district court for Lancaster county against all of the 254 policy-holders, and had summons directed to the sheriff of each of the outside counties where any of the policy-holders resided. The defendant, George Sporl, for a separate answer alleged that, at the time of the commencement of this action and for a long time prior thereto and ever since, he was and has been a resident of Nance county; that the only defendants in this suit residing within the county of Lancaster at the time of the commencement thereof were Charles Newman, J. W. Jacoby, and G. M. Coffman; that the summons for the answering defendant was issued by the clerk of the district court for Lancaster county, directed to the sheriff of Nance county, and by said sheriff served upon said defendant in said Nance county; that no other service was made upon him, and that he has made no voluntary appearance in said cause; that the petition does not set forth any joint liability against the answering defendant, or the said defendants or either of them residing in Lancaster county, and that the answering defendant is not and was not jointly liable with the defendants residing in Lancaster county or any of the defendants mentioned in the petition for any sum of money whatever. Wherefore said defendant "challenges the jurisdiction of the court over his person, and alleges the fact to be that said action is not rightly brought against him in said Lancaster county."

A general demurrer to the answer was sustained, and, defendant electing to stand upon his answer, judgment was entered against him for \$146.25, from which judgment he prosecutes this appeal.

The main grounds assigned by plaintiff as a basis for his right to join these 254 actions at law in one suit in equity, and to send process for 251 of the defendants to the numerous outside counties in the state, are: That the company issued to each of the defendants, on or about

the day mentioned in their respective applications, a policy of insurance insuring him against loss or damage to his crops, "which several policy each one of the defendants received and now holds, and each of the defendants, by virtue thereof, is a member of the said Mutual Hail Insurance Society of Nebraska; that each of the defendants duly signed and delivered to the said corporation * * * an application in writing, and became thereby bound and holden, as is provided by law, for his ratable share of all the losses and expenses of said society incurred while he was a member, and each of the defendants is indebted to the said corporation and its creditors in the specific sum so assessed against him;" that the aggregate sum of all the individual assessments of the defendants, if realized, would be more than sufficient to pay the costs and the principal and interest due the creditors; but that certain of the defendants have removed from the state, and others are insolvent; that in order to make a just, ratable and equitable distribution among the members of the burden of said corporate debts, a court of equity should take into account the losses in collections that will result from such removals and insolvency, "and, upon rendition of judgments for the full amounts of said assessments, plaintiff will submit to the court whether execution should immediately issue for the full liability, or whether, in the first instance, an execution for a part only thereof would be considered adequate for the collection of a sum sufficient to discharge all of the said liabilities and costs;" that this suit is ancillary only to the main receivership suit; that the funds to be derived from the proceedings are trust funds for equal and ratable distribution among the creditors, and the application and distribution thereof should be ordered and directed by a court of equity; that separate and independent actions at law against each of the defendants would require a multiplicity of law suits, "and would lead to excessive and interminable complications, and inflame and excessively aggregate the costs of administering the

affairs of said corporation, so as to become burdensome upon said trust, in that costs of separate suits and costs of reputable counsel or attorneys would necessarily equal or exceed in most cases the entire avails of individual actions commenced in justice court, with right of successive appeals to the supreme court; that attempts to enforce said liabilities by such separate suits would leave open to controversy an issue in each separate suit as to the necessity of enforcing said assessment in full, and as to whether the amount of all the unpaid debts sufficiently justified the enforcement of said full assessment against each individual member;" that in all of the aforesaid respects plaintiff is without an adequate remedy at law, and that the collection of sums necessary to discharge said debts can only be made in equity, and the affairs of the company can only be administered by and through the aid of a court of equity. The prayer of the petition is that the court may inquire and determine that the defendants are members of the company, ascertain the particular time for which they carried insurance, the particular debts accruing against the company during the term of membership of each of the defendants, and fix and decree the amount of the liability of each one of the defendants; "that a several judgment be entered in favor of plaintiff and against each one of the defendants found liable as a contributory upon said assessment to the payment of the corporate debts of the said Mutual Hail Insurance Society of Nebraska and the costs of this proceeding, and that execution be awarded against each defendant for the amount so found due from him, or, if the sums apparently collectible upon said judgment should appear to the court to be in excess of that required for the payment of said debts and costs, then the amount for which execution shall issue in the first instance against each defendant may be ascertained and determined by the court."

It will be observed that the petition expressly alleges that the company "issued to each one of the defendants"

a "several policy" upon his individual application, and that "each of the defendants" is indebted to the said corporation and its creditors "in the specific sum" so assessed against "him," and that in the prayer the court is asked to ascertain "the particular term" for which each policy-holder carried insurance that the court decree the amount of the liability of "each one of the defendants," and that "a several judgment" be entered in favor of plaintiff and "against each one of the defendants." It is apparent, therefore, that plaintiff is seeking in this suit in equity to obtain 254 judgments at law. Section 121, ch. 43, Comp. St. 1909, governing companies of this character, provides: "Such companies may issue policies only on growing crops, insuring against damage or loss by hail, and for any time not beyond the life of its charter. * * * All persons insured shall make application in writing, obliging (obligating) themselves to the company for the payment of losses and expenses as required by the by-laws of the company. The liability of the members may be limited by the by-laws, provided that if the total amount collected in any year shall be insufficient to pay all losses and expenses for that year, then the persons sustaining losses shall receive their proportion of the fund realized from the assessment, in full satisfaction of their loss; and no member shall be required to pay more than the amount of his obligation." No by-laws are shown to have ever been adopted, and it is argued by plaintiff that, because the liability of the members has not been limited by the by-laws, therefore their liability is unlimited, and that each member or policy-holder is personally liable for all of the debts of the company. The trouble with this contention is that the statute quoted fixes a maximum liability, viz., "and no member shall be required to pay more than the amount of his obligation." No limitation less than that fixed by the statute having been fixed by the by-laws of the company, it may be conceded that each policy-holder would be liable for the company's debts to the full amount of his obligation,

but that does not render him liable for the entire debts of the company. It would be hard to conceive how any such company could induce substantial and conservative farmers to insure their growing crops when by so doing they would incur such a liability.

Section 124 of the act under which the company was operating provides: "Suits at law may be brought against any member of such company who shall neglect or refuse to pay any obligation given by him or her according to the provisions of this act, and the directors or officers of any company so formed who shall wilfully refuse or neglect to perform the duties imposed upon them by the provisions of this act shall be liable in their individual capacity to the person sustaining such loss." The legislature has, therefore, prescribed both the maximum of a member's liability and the form of action by which the payment of that liability may be enforced; and we do not think the fact that the company has become insolvent can in any manner enlarge such liability or change the form of action which may be resorted to for its enforcement. The claim that the present suit will avoid a multiplicity of suits is without merit. Except as it may operate as a "big stick" in preventing policy-holders from defending the suit at long range, it would not materially lessen the litigation, as each defendant would have a perfect right to employ counsel, set up his separate and independent defenses, and demand a separate jury trial. *Hale v. Allinson*, 102 Fed. 790, affirmed in 188 U. S. 56; High, Receivers (4th ed.) sec. 316; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150; *Winters v. Armstrong*, 37 Fed. 508; *Smith v. Johnson*, 57 Ohio St. 486; Smith, Receiverships, sec. 231.

The cases cited by plaintiff, from this and other courts, to the effect that a creditor of an insolvent corporation cannot bring a separate action against an individual stockholder of such corporation for the unpaid portion of his stock subscription, but that a receiver should be appointed to bring suit for the benefit of all the creditors,

are not in point here. Nor can any of those cases be held to apply to a case like this, where the statute itself has fixed the kind of action that may be resorted to. The reason for those holdings is apparent. If each of the 55 creditors in this case were permitted to commence a separate action against each of the 254 policy-holders, and each of the 254 policy-holders, in order to avoid paying more than his ratable proportion of the indebtedness, should be compelled to bring an action for contribution against each of his 253 copolicy-holders, the courts of this state would be kept busy for a number of years to come in disposing of this litigation. The court in this case did right in instructing the receiver to collect from the policy-holders, by suit if necessary, the amounts due from them under their contracts with the company; but it would not be warranted in ordering, nor do we understand from the allegations of the petition that it did in fact order, the receiver to proceed against all of the defendants by a suit in equity. It is the duty of the receiver to obey the order of the court, but in so doing the constitutional rights of each defendant must be recognized, and he will have to proceed by separate actions at law in which each defendant may have the right to defend his own suit free from the embarrassing presence of other defendants with whom he has no joint liability. The fact that this may be expensive and may result in the creditors failing to receive payment of their demands in full is a circumstance which cannot be considered. There is ample authority to sustain our holding, in addition to the cases above cited, but we do not deem it necessary to take the time or to enlarge this opinion by a reference to them.

The judgment of the district court is reversed and the cause remanded, with directions to overrule plaintiff's demurrer.

REVERSED.

EMIL POLENSKE ET AL., APPELLANTS, V. ALBERT S. ENNIS
ET AL., APPELLEES.

FILED APRIL 8, 1911. No. 16,361.

Venue: SUMMONS TO ANOTHER COUNTY. "The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether his interest in the action and in the result thereof is adverse to that of the plaintiff." *Barry v. Wachosky*, 57 Neb. 534.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

M. A. Hartigan, for appellants.

W. S. Morlan, contra.

FAWCETT, J.

From a judgment of the district court for Adams county, dismissing plaintiffs' action against the defendant School District No. 17, Red Willow county, for want of jurisdiction, plaintiffs appeal. As the controversy here is solely between the plaintiffs and defendant school district, the parties will be referred to simply as plaintiffs and defendant.

November 14, 1906, defendant entered into a written contract with one R. M. Liberty for the construction of a large school building, and he gave defendant a contractor's bond, with the Bankers Surety Company as surety. On the same day the contractor entered into a subcontract with one A. S. Ennis, by which Ennis agreed "to furnish all material and labor necessary to build and complete all masonry, * * * including all iron, structural iron, galvanized iron, steel ceiling in place and complete." Plaintiffs furnished the subcontractor, Ennis, a quantity

of brick for use in the construction of the school building. October 1, 1907, plaintiffs presented to Mr. Ennis a written statement showing a balance due them, and received from him, as they allege, an assignment of his claim against the defendant. After obtaining this assignment, plaintiffs brought this suit against all of the parties named, in the district court for Adams county, where they obtained service upon Ennis. Summons was thereupon sent to Red Willow county and served upon defendant. Defendant appeared specially and challenged the jurisdiction of the court over defendant, for the reason, among others, that "there is no privity between the defendants Albert S. Ennis, Richard M. Liberty, the Bankers Surety Company of Cleveland, Ohio, and this defendant." The special appearance was sustained and plaintiffs' action dismissed as to defendant school district. This presents the only question for consideration on this appeal.

Plaintiffs' amended petition will make the matter plain. The petition alleges that plaintiffs are a partnership; that Ennis and Liberty entered into a contract with their codefendant school district for the erection of the building referred to; that the surety company became surety for the labor and material used in said building; that plaintiffs furnished brick for the erection of the building; "that said brick were used in the construction of said school building, and that the defendant Albert S. Ennis was a subcontractor under his codefendant Richard M. Liberty, but that, from time to time, the said school district recognized him (Ennis) as a contractor, paid moneys direct to him, and upon his order when so requested, upon the original contract for the erection of said building; that there is coming to, due and payable from said school district to the defendant Albert S. Ennis, the sum of \$4,900 upon the contract as aforesaid as such contractor, which is now due and payable from said school district to the said Ennis, which amount said school district promised and agreed to pay.

"These plaintiffs further show unto the court that the defendant Albert S. Ennis has assigned, set over and guaranteed the payment of the moneys due and owing to him from his codefendant School District No. 17, Red Willow County, McCook, Nebraska, for the purpose of paying the amount due and payable to these plaintiffs.

"The plaintiffs further show unto the court that the defendants Richard M. Liberty and school district, as aforesaid, and the surety company have conspired and federated together to cheat and defraud these plaintiffs in this, to wit, they claim and allege that there is nothing due or coming to their codefendant, Albert S. Ennis; that there is nothing due or coming to said plaintiffs by reason of said assignment, which claim and assumption they well know to be false and fraudulent as against these plaintiffs.

"Plaintiffs allege that said school district has now in its possession a large amount of money due the said Albert S. Ennis, and by him assigned to these plaintiffs. That said school district has paid over to its codefendant Richard M. Liberty a large amount of money since the making of the assignment aforesaid, and after these plaintiffs had given them notice of such assignment of the moneys belonging to the defendant Albert S. Ennis; that said school district is withholding large sums of money due said Ennis, claiming that their codefendant surety company has demanded that the same be withheld and payment refused. But these plaintiffs show unto the court that said defendants, they, each and every of them, refuse to give any accounting or make any accounting for the money in their hands due and payable to these plaintiffs by reason of the assignment aforesaid of the moneys due and coming to the said Albert S. Ennis.

"Plaintiffs further show that Albert S. Ennis is insolvent, and, unless these plaintiffs have the benefit of the moneys to them assigned, they will suffer the loss of their claim and indebtedness to them and suffer thereby irreparable injury."

The above are all of the averments contained in the amended petition, and they clearly show that Ennis was not a necessary party to plaintiffs' action. They had obtained from him an assignment of his claim against the defendant. According to the allegations of their own petition, there is ample funds in the hands of the defendant to pay the amount of their claim under that assignment. They are not seeking to recover upon a lien for material furnished, but base their right upon their assignment of Ennis' claim against defendant for an alleged balance due him, which, so far as the petition advises us, may be wholly for iron and steel furnished by other material men. Their petition contains no allegation of any liability on the part of Ennis to them, other than that contained in their statement for brick furnished him, for which they say he assigned and set over to them his claim against the defendant, "for the purpose of paying the amount due and payable" to them. Their petition shows that Ennis is insolvent, so that a judgment against him would avail them nothing, and it was evidently for this reason that they obtained from him the assignment in question. It is clear from plaintiffs' own statements that they took the assignment from Ennis of his claim against the defendant in full satisfaction of their claim against him. Hence, there is no privity of liability between Ennis and the defendant, nor has Ennis any interest in the subject of litigation, which is adverse to that of plaintiffs.

The test of plaintiffs' right to join defendant with Ennis in an action brought in a county other than the county of defendant's residence is well stated in the second paragraph of the syllabus in *Barry v. Wachosky*, 57 Neb. 534: "The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether

McCoy v. City of Omaha.

his interest in the action and in the result thereof is adverse to that of the plaintiff."

The judgment of the district court is right, and it is

AFFIRMED.

**FRANK L. MCCOY ET AL., APPELLANTS, V. CITY OF OMAHA
ET AL., APPELLEES.**

FILED APRIL 8, 1911. No. 16,231.

MOTION for rehearing of case reported in 88 Neb. 316.
Motion overruled.

SEDGWICK, J.

It is said in the opinion that the two officers of the board of public works who signed the notice for bids constituted a majority of the board. This was a mistake. The notice was signed by the president and secretary. The president is the principal member of the board, as is pointed out in the opinion, but the secretary is not a member of the board. The board consists of the city engineer, the comptroller, and the building inspector, and the secretary of the advisory board acts as secretary of this board also. The board of public works was required by ordinance to give this notice; the notice was duly given, and the bids for the construction of the improvement were received and the work done. This board had no discretion in the matter; it was required by ordinance to have this notice published, and the notice was published. We think that is sufficient. At all events, the jurisdiction of the city council to levy the assessment complained of did not depend upon this notice. The jurisdictional notice was properly given. It is not complained that too much was paid for the work, or that there would have been more bidding if the board had spread upon its records a formal order directing the

Frederick v. Gehling.

president and secretary to sign and publish this notice. If such a formal proceeding was necessary, the irregularity was not such as to render the whole proceeding of the council void and subject to collateral attack.

The motion for rehearing is

OVERRULED.

PETER FREDERICK, SR., APPELLEE, v. MARY GEHLING, APPELLANT; JOHN W. BUCKMINSTER, INTERVENER, APPELLANT.

FILED APRIL 8, 1911. No. 16,349.

1. **Quieting Title: DEFENSES: DEMURRER.** In an action to remove a mortgage as a cloud from plaintiff's title which he had acquired by purchase of the real estate at execution sale, it was alleged in the answer that plaintiff formerly had two mortgages which were liens upon the real estate prior to the lien of the execution judgment, and that the owner of the fee had paid these mortgages with the proceeds of another mortgage which he gave on the same land for that purpose, which mortgage had in turn been paid with the money loaned by defendant for which defendant's mortgage was given, and that all this was done with the knowledge of plaintiff. *Held*, That such answer was not subject to general demurrer.
2. ———: ———: ———. In such case the further allegation that the plaintiff, knowing that the defendant's mortgage had been so given and received, and that all prior mortgages had been in fact so paid without being canceled on the record, procured the said prior mortgages to be deducted by the appraisers from the value of the land in the execution sale and so purchased the land at about one-fifth of its real value, and afterwards procured the said prior mortgages to be released, with the purpose of defrauding defendant, her mortgage being subsequent to the lien of the judgment under which plaintiff purchased the land, is held to state a defense as against a general demurrer.
3. **Parties: INTERVENTION.** In such an action the owner of the fee has such an interest in the land which is the subject of litigation as to enable him to intervene and contest the plaintiff's title and assert the homestead character of the land.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. H. Edmunds and Edwin Falloon, for appellants.

A. W. Crites and Reavis & Reavis, contra.

SEDGWICK, J.

A general demurrer was sustained to the defendant's answer and judgment on the petition rendered in favor of the plaintiff, and the petition in intervention was stricken from the files. The defendant and intervener have appealed.

The plaintiff brought the action to "remove the cloud cast" by a mortgage of defendant upon a quarter section of land in Sheridan county. He alleged in his petition that in 1902 a judgment was rendered in justice court in Richardson county against one Buckminster and his wife in favor of certain persons not now parties to these proceedings, and that the judgment was transcribed to the district court for Richardson county, and afterwards, in December, 1904, to the district court for Sheridan county, and thereby became a lien upon the said quarter section of land, which was the land of the said Buckminster that execution was issued on the said judgment and was by the sheriff of Sheridan county levied upon the said land, which was sold upon said execution according to law on the 20th day of May, 1907, and was purchased at said sale by the plaintiff; that the sale was afterwards confirmed by the district court and a deed executed to the plaintiff by the sheriff on the 18th day of June, 1907, which deed was duly recorded, and that by these proceedings the plaintiff became "vested with the absolute title in fee simple to the lands." The petition then alleges that, after the lien of said judgment had attached to the land, the defendant Mary Gehling procured a mortgage on the land for the sum of \$600 and

Frederick v. Gehling.

caused the same to be recorded; that this mortgage was a subsequent lien to the plaintiff's title, and he asks that it be removed as a cloud upon his title.

The answer is not artistically drawn. It appears to rely upon two defenses: That plaintiff himself had two several mortgages upon the land that were prior to the lien of the judgment under which he purchased it, and that a third mortgage was given to obtain the money with which to pay off plaintiff's mortgages, the proceeds of which were used for that purpose, and that the defendant's mortgage was in turn given for money loaned by defendant to pay the third mortgage, and the proceeds thereof were so used, so that the defendant's mortgage ought in equity to be adjudged prior to plaintiff's lien. The allegations of the answer upon this point, after describing defendant's mortgage, are "that with the proceeds of said \$600 said John W. Buckminster on the 20th day of April, 1907, paid said A. E. Buckminster his said note and mortgage, and A. E. Buckminster executed a release of said mortgage; * * * that said \$600 which was borrowed of this defendant as aforesaid was used to pay off the mortgage recorded in book 10 on page 110 of mortgage records of said Sheridan county, which mortgage is more particularly described in the preceding paragraph of this amended answer." It is also alleged in the answer that the plaintiff knew of these facts, and knew that this money borrowed of the defendant was used to pay off the mortgage, which was given to pay the mortgages which he himself held. The second defense is that, when the plaintiff purchased the land at execution sale, he knew that the three prior mortgages had been paid with the proceeds of the defendant's mortgage, and, as the record did not disclose the fact of the payment, he was able to and did procure the three prior mortgages to be deducted as liens by the appraisers, thus enabling him to purchase the land for a fraction of its real value, and upon a lien that appeared upon the records to be prior to defendant's mortgage, thereby perpetrating a

fraud upon the court and its officers, as well as upon the defendant.

1. The principal question discussed in plaintiff's brief is whether the answer sufficiently alleges that the mortgages which had been paid off were in fact deducted as liens in the appraisement of the land. The defendant in the brief assumes that this matter is sufficiently alleged in the answer, and the plaintiff, who filed his brief afterwards, contends strenuously that it is not sufficiently alleged. If the land was worth from \$1,600 to \$1,700 at the time of the sale upon execution and the plaintiff procured it to be appraised at \$500 by having the three mortgages which had been paid off deducted as liens, and so bought the land for about one-fifth of its value, he ought not to prevail in this action as against the defendant Mrs. Gehling. The plaintiff does not allege when his execution was issued, nor when it was levied, but the answer alleges that the land was sold thereunder on the 30th day of May, and the sale confirmed on the 14th day of June, 1907, and that the execution was issued on the 20th day of March, 1907. The Plaintiff's brief does not give due consideration to the various allegations contained in the answer. The matters relied upon by plaintiff should have been presented in reply to the answer. The answer, as against the general demurrer, sufficiently alleges that the mortgages which had been paid were deducted as liens by the appraisers from the value of the land. This allegation is in the answer: "That these liens were deducted from the value of said premises and said premises were appraised by said appraisers after said liens had been deducted at the sum of \$500." And again: "That at the time said sale was made said liens were still of record and in force on said land and deducted from its appraised value," and that "said Peter Frederick in fact bought said land charged with said liens; * * * that said land, at the time it was purchased by the plaintiff, was worth at least \$1,700, and was in fact appraised at that amount if the fact is taken into consideration that said appraisers still considered at the time said appraise-

ment was made that said liens were still subsisting against said land." In the plaintiff's brief it is argued that this allegation of the answer that the land was worth \$1,700 at the time it was appraised is shown to be untrue by computation because the amount of the liens was only \$1,182.32 and the land was appraised at \$500, making in all \$1,682.32, or \$17.68 less than \$1,700; but this defect would not be much more than the interest that would accrue on these liens from the time of the appraisal to the time of the sheriff's sale. At least the difference would not be so great as to overcome all of these allegations in the answer as to the method of appraisal.

2. The intervener set up the facts as to the fraudulent conduct of the plaintiff in purchasing the land at the execution sale, and also alleged that the land was his homestead and that the plaintiff's judgment was never a lien thereon. The allegations as to its being a homestead are indefinite and perhaps insufficient, but it seems that the controversy here is in regard to the land itself. The plaintiff claims the land and is seeking to quiet his title, and the intervener claims the land and alleges that the plaintiff's supposed title is fraudulent and ought to be set aside. The defendant is seeking to fasten a lien upon the land, and this appears to present a proper case for the intervener, John W. Buckminster, to assert and test his claim in the land. If the action of the court in sustaining the motion to strike the petition in intervention from the files can be sustained, it can only be upon the ground that it was in fact a general demurrer, and that the pleading does not state facts sufficient to entitle the intervener to any relief. The allegations are very general, and might not admit a full investigation of the rights of the parties, but cannot be disposed of upon a general demurrer or motion to strike out the pleading.

For these reasons, the judgment of the district court is reversed and the cause remanded for further proceedings.

LETTON, J., not sitting.

REVERSED.

BARNES, J., dissenting.

My understanding of the answer of the defendant, Mary Gehling, and the conclusions to be drawn from its allegations differ from those expressed by the majority. I am of opinion that the answer fails to state facts sufficient to entitle the defendant to any relief by way of subrogation. It appears that the intervener, John W. Buckminster, allowed the land in question to be sold at the plaintiff's execution sale without protest or objection, and at that time made no homestead claim to the same. By the allegations of his petition he has not shown that he has any such interest in the controversy between the plaintiff and the defendant, Mary Gehling, as would give him the right to be made a party by intervention. Therefore the order of the district court striking his petition of intervention from the files was right.

As I view the pleadings, the judgment of the district court should be affirmed.

FAWCETT, J.

I concur in so much of the above dissent as refers to the attempted intervention by John W. Buckminster.

JOHN A. KEMMERLING V. STATE OF NEBRASKA.

FILED APRIL 8, 1911. No. 16,978.

1. Contempt: INCOMPETENT EVIDENCE: REVIEW. Upon review in this court of a trial by the district court without a jury, it will not be presumed that the trial court acted upon or considered incompetent evidence. The action of that court in admitting evidence will not be reviewed.
2. ———: REVIEW. The evidence in the record is found to be sufficient to support the judgment.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

A. S. Ritchie and J. W. Woodrough, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

SEDGWICK, J.

The defendant was convicted of contempt of court in the district court for Douglas county, and has brought the case here for review upon petition in error. The substance of the charge against him was that, while he was a juror of the regular panel, he agreed with the claim agent of the Omaha & Council Bluffs Street Railway Company to use his influence as a juror in a certain case pending in the district court in which that company was defendant, and prevent a verdict against the company, for the agreed amount of \$25, and received the sum of \$5 upon said agreement.

1. It is first argued in the brief that a prosecution for contempt not committed in the presence of the court is essentially a criminal prosecution, and should be tried and determined as such with the exception that the defendant is not entitled in such prosecution to trial by jury. This proposition is not contested by the attorney general and will not be further discussed.

2. The next contention is that the evidence of two witnesses was incompetent and was improperly received. It has frequently been held by this court that, in the trial of a case before the district court and without a jury, it will not be presumed that in determining the issue presented the court acted upon or considered incompetent evidence.

3. It is contended that the evidence in the case is not sufficient to support a judgment of conviction. The al

State v. Bisping.

legation in the information that the agreement of the juror to use his influence was with reference to the case of West against the Omaha & Council Bluffs Street Railway Company, it is insisted was not proved upon the trial. There were several cases pending against the company, but there is no evidence that the defendant was a juror in any of those cases except the case specified in the information. The defendant did not testify in his own behalf, nor did the claim agent of the company, but the defendant called the foreman of the jury in the specified case, and he testified that the defendant served upon that jury, and voted for a verdict in favor of the company, and that the jury failed to agree. There is also evidence that the defendant, after that case had been tried, stated that he had fulfilled his agreement and was the cause of "hanging the jury."

We think that the evidence, being wholly uncontradicted or explained by the defendant himself or any other witness, is sufficient, upon a point not of the substance of the offense, to justify the finding of the court, who was familiar with all of these cases and the part taken therein by the defendant as juror. The substance of the offense charged was proved beyond question.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. CITY OF CRAWFORD, APPELLEE, V. CHRISTOPHER H. BISPING ET AL., APPELLANTS.

FILED APRIL 8, 1911. No. 16,999.

1. **Mandamus: RIGHT TO ANSWER AFTER DEMURRER OVERRULED.** When a demurrer to an application for a writ of mandamus or to the alternative writ itself is overruled, the respondents should ordinarily be allowed to answer. This is so when the demurrer has been sustained by the trial court, and is overruled by this court upon appeal. In such case when the judgment of the trial

State v. Bisping.

court is reversed and the cause remanded generally, or with specific instructions to allow the relator to amend, the respondents should ordinarily be allowed to answer after relator has amended his application for the writ.

2. ———: **ISSUES: TRIAL.** When it appears to the trial court upon the objections of respondents to the allowance of a writ of mandamus that there is a substantial issue of fact upon which the right to the relief demanded depends, an alternative writ should be issued returnable to the county where the action is pending. Such issues cannot be tried at chambers.
3. ———: **PLEADINGS.** When the alternative writ is issued, it must contain all of the facts upon which the relator relies. The writ and return, or answer, thereto constitute the issues. No other pleadings are allowed.
4. ———: **PROCEDURE.** When upon notice of application for a writ of mandamus the respondents appear and object to the allowance of any writ, and no substantial issue of fact is presented by the objections of respondents, the court may issue a peremptory writ, and the district judge has such jurisdiction at chambers in any county in his district, and without issuing any alternative writ.
5. ———: **RETURN.** If a general denial in the objections or answer to the application for the writ of mandamus is inconsistent with other allegations or admissions in the answer, such general denial should be disregarded.
6. ———: ———. The application of the city of Crawford for a writ of mandamus alleged that "the relator is and has been since May, 1907, a municipal corporation, having a population of more than 1,000, existing under the laws of Nebraska as a city," that prior to that time the same territory was incorporated and styled the "Village of Crawford," and that the relator "succeeded to all the rights of said village." *Held*, That the denial of the answer "that the said relator is a city of the second class, and that it has ever been such city," is not a sufficient allegation of fact to constitute a defense.
7. **Highways: ROAD FUND: CLAIMS AGAINST COUNTIES: POWER TO COMPROMISE.** When a county has collected money for the road fund upon property of a city or village, one-half of such money belongs to the city or village, and should be paid over by the county treasurer upon demand. The officers of the city or village have no power to compromise the right to such money. The payment of a part by warrant which is received by the city or village as full payment, and an order of the county

State v. Bisping.

board "disallowing" the remainder of a claim filed for the whole amount, and the fact that no appeal has been taken from such order, constitute no defense in favor of the county.

8. ———: ———: ———: DEFENSES. The allegation that the county "disputed the receipt of said sum of money in good faith" is too indefinite to furnish, in any view, a basis for a compromise; it not appearing from the allegation what part of the city's claim was disputed by the county, and no facts being alleged from which it can be determined whether there was in fact a genuine controversy.
9. **Mandamus: CLAIMS AGAINST COUNTIES: DEFENSES** This action having been pending for more than 15 months, an answer was filed alleging that no estimate or appropriation has been made or published to provide for the payment of the money, and there is now no cash in the treasury, nor any levy against which a warrant could be issued, nor any adjudication of the claim by any court or by the county officers. *Held*, That these allegations constitute no defense.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed*.

Edwin D. Crites, for appellants.

Earl McDowell, A. M. Morrissey and A. G. Fisher,
contra.

SEDGWICK, J.

The principal facts in this case are recited in the opinion on the former appeal. *City of Crawford v. Darrow*, 87 Neb. 494. When the cause was returned to the district court, the relator with leave of the court amended the title of the cause. The term of office of one of the respondents expired during the pendency of this action, and by amendment the name of his successor was substituted as respondent. The relator then applied to one of the judges of the court at chambers for a peremptory writ. The attorney for the respondents appeared and filed an answer in the names of the original respondents, ignoring the substitution of the name of the new member. The judge thereupon entered the following order: "The judge being

of opinion that the said answer being filed after an appeal and remand comes too late, and therefore refuses to consider the same." He thereupon ordered a peremptory writ of mandamus to issue. The respondents have appealed. Afterwards the district judge allowed the respondents to supersede the order by giving an undertaking in the sum of \$200.

Upon the former appeal to this court, it appeared that the trial court had sustained a general demurrer of the respondents to the relator's application for the writ. This court reversed the judgment of the trial court and remanded the cause, "with leave to relator to amend the alternative writ if one has been issued, if deemed necessary, and, in case none has issued, to amend its petition, if so advised."

1. The first contention is that the trial court erred in refusing to consider the answer of the respondents. In *Long v. State*, 17 Neb. 60, Judges REESE and MAXWELL expressed the opinion that, when a demurrer to a writ is overruled, "the defendant still may be permitted by the court to file an answer to the writ." In *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476, the case of *Long v. State*, *supra*, is cited as authority for the proposition that a demurrer is the proper pleading to test the sufficiency of a petition for a writ of mandamus, and it is said that the ordinary rule of pleading applies in mandamus cases. This view of the law has been adhered to in subsequent cases. The action of this court upon the former appeal was in effect to overrule the demurrer of the respondents which the trial court had sustained, and when the cause was remanded the respondent under such circumstances should ordinarily be allowed to answer. The fact that the trial court sustained the demurrer indicates, if it does not determine, that the respondents had sufficient reason to file such demurrer in good faith. The decision of this court allowing a relator to amend his proceedings should not be construed as denying the right of the respondents to answer upon the overruling of their de-

State v. Bisping.

murrer. If the relator had amended the substance of its application for the writ, alleging additional grounds therefor, it would follow, as a matter of course, that the respondents were entitled to answer. The reason then given by the trial court, if taken literally, does not justify the ruling.

2. The relator has strangely ignored the regular order of procedure in such cases. When application for the writ is made, and notice of the application is given, the respondent may appear and object to the allowance of any writ. If a demurrer is filed to the application, as was done in this case, and the demurrer is overruled, as was also done by this court, ordinarily the respondents may allege such facts as will show that no writ should issue. The rule as to pleading over and amendments is the same as in other civil cases. If objections to the application for the writ are filed, as was done in this case after the demurrer had been overruled by this court, the trial court should consider whether the objections show that there are substantial issues of fact between the parties, and, if it appears that there are such issues to be tried, the alternative writ should be issued returnable in the county where the action is pending and can be tried. The alternative writ should allege all of the facts that the relator relies upon as entitling him to the relief by mandamus. When the writ is served upon respondents or service waived, the respondents must make a return (answer) to the allegations of the writ. The writ and return form the issues. No other pleadings are required. The allegations of the return are regarded as denied, and must be proved by respondent. If at the hearing upon the application for the writ the objections of respondents to the issuing of the writ are insufficient or frivolous, no alternative writ is necessary. In such case the court should issue a peremptory writ at once, if the application and evidence offered by relator are sufficient to entitle him to that relief. The district judge at chambers has jurisdiction to order a peremptory writ of mandamus,

if no substantial issue of fact is presented by the answer or objections of respondents. *Mayer v. State*, 52 Neb. 764.

The same case holds that, if the respondent by answer or objection to the writ makes it appear that it will be necessary to determine substantial questions of fact in the case, a peremptory writ cannot be issued at chambers; issues must be formed by the alternative writ and return, and such issue must be tried in court.

3. The objection of respondents, then, that the court should have directed the issuance of an alternative writ, and that the court erred in granting the peremptory writ upon the pleadings without evidence, and that the court had no jurisdiction at chambers to grant the peremptory writ, all depend upon the sufficiency of the answer. If the allegations of the answer were sufficient to constitute a defense, these objections are well taken; but, if the allegations of the answer filed furnish no sufficient reason in law to refuse the relief demanded, then the trial court should for that reason have ordered the peremptory writ, and the fact that the language used by the court may be construed to furnish an insufficient reason for the judgment will not require a reversal.

4. It will be seen from the statement of facts in the opinion upon the former appeal that the action was to require the proper authorities of the county to issue a warrant in favor of the city of Crawford for one-half of the road fund that had been collected upon property within the city for certain specified years. The answer begins with a qualified general denial in these words: "Denies each and every allegation therein contained except so far as said allegations are hereinafter admitted or qualified." There is a special denial in the answer "that the said relator is a city of the second class within said state and that it has ever been such city." It is alleged in the petition that the village of Crawford had become a city by increase of population, and "the relator is and has been since May, 1907, a municipal corporation; having a population of more than 1,000, existing under the

laws of Nebraska as a city;" that prior to that time the same territory was incorporated and styled the "Village of Crawford," and that the relator "succeeded to all the rights of said village." This special denial is not a sufficient answer to these allegations. The money in controversy was received by the county during a series of several years, and during that time, according to the allegations of the petition, the village of Crawford, the population having increased to more than a thousand, became, by operation of law, the city of Crawford. If the relator is not a *de facto* city of the second class, facts should be alleged from which that matter can be determined.

5. Another allegation of the answer is that the relator first made the claim against the county of \$1,439.54 "for an alleged one-half of road taxes collected within the village of Crawford for previous years," and that the respondents allowed one-half of that amount and issued a warrant which the relator accepted. It was decided in *City of Chadron v. Dawes County*, 82 Neb. 614, that one-half of the road tax collected within the city or village by the county authorities belongs to such city or village, and is not held by the county as owner or debtor, but in trust for the city or village to which it belongs, and this holding is cited with approval in the opinion upon the former appeal in this case. It would not therefore constitute such a claim against the county as the authorities of the city could compromise or cancel in whole or in part. It was the duty of the county treasurer to pay over this money to the city upon demand, unless by some wrongful action of the county authorities he had been prevented from so doing. These allegations of the answer therefore stated no defense.

6. It is further alleged in the answer that the respondents "did in good faith dispute and deny the receipt of said sum of money, and do now deny and dispute the receipt of the same and the liability of said county to said village therefor, and were about to disallow said claim in its entirety." These allegations do not furnish

sufficient ground to authorize a compromise of the claim of the relator. There is attached to the answer, as a part thereof, an exhibit which shows the itemized claim of the relator against the county, amounting to \$1,439.64. The allegation that the county denies the receipt of said sum of money is too indefinite to show that there was in fact any controversy in good faith as to the amount of money in the hands of the county belonging to the city. It is not stated what the contention of the county is in that regard. It does not appear what part nor how much of the claim of the city was contested by the county. Construing this allegation most strictly against the county, it does not allege a contest in good faith of a sufficient amount of the claim to furnish a consideration for a compromise, nor does it state any reason for such contest or dispute of the plaintiff's claim or any fact upon which any such dispute could be justified. The allegation of a supposed compromise based upon such a controversy would not constitute any defense to the allowance of the mandamus.

7. It is further alleged in the answer that after the supposed compromise had been made the respondents allowed one-half of said claim as made, and disallowed the other half, and issued a warrant for the one-half allowed, which was received by the relator as full payment of the claim, and that no appeal was taken by the relator from the action of the county board in disallowing one-half of the claim. In *City of Chadron v. Dawes County*, 82 Neb. 614, it was said: "The fund had been raised in the exercise of a governmental function, for governmental purposes, and, we think, was held in governmental capacity. But whether so or not, it seems clear to us that the county held that portion belonging to the city as a public trust; that it was the continuing duty of the county to faithfully execute the trust by paying over the money." There was nothing for the county board to adjudicate in the matter. The county had in its treasury money that belonged to the city. It was the duty of the county treas-

urer, as before stated, to pay this money over to the city on demand. The county board had transferred it to the general fund of the county. This action was considered an obstruction in the way of the treasurer's performing his duty. It was enough for the city to request the county board to remove this obstruction and permit the county treasurer to perform his duty. The filing of the claim with the county board must be considered as an application on the part of the city for an order to return this money to the proper fund so that the treasurer might comply with the law, and the county board had no jurisdiction to take any other action.

8. These various allegations of the answer amount to an admission that the county had collected from the property of the city for the road fund an amount of money substantially as alleged in the petition, and that one-half of the amount so collected had been paid over to the city and the other half retained by the county. The qualified general denial in the answer is inconsistent with these admissions, and therefore is of no avail as a defense.

9. The allegation "that there is now no cash in the treasury of said county, or any estimate or appropriation to cover said claim, nor any levy against which a warrant therefor could be drawn, nor any adjudication by any court whereby these respondents as a board of county commissioners of said county or by any board of county commissioners of said county under which a warrant therefor can be drawn," and the allegation that one of the original respondents "has gone out of office and has been succeeded by Martin J. Weber, who has not been served," constitute no defense. The respondents cannot defend their action by disposing of the money that was in the treasury at the time the action was begun, as they may have done so far as this allegation goes, nor can they object that the writ runs against one who was not properly served, but has appealed, and is now a proper party. It does not appear from the answer that the respondents

have any substantial defense, and the court therefore did right in disregarding the answer.

The judgment of the district court is

AFFIRMED.

GEORGE NIXON V. STATE OF NEBRASKA.

FILED APRIL 24, 1911. No. 16,890.

1. **Larceny: SUFFICIENCY OF EVIDENCE.** In a prosecution for burglary and larceny, the jury found the accused not guilty of burglary, but guilty of larceny, and that the value of the property stolen was \$50. The evidence is examined, the substance set out in the opinion, and it is *held* that there was sufficient to support a conviction of larceny.
2. ———: ———. While it is necessary, in order to sustain a verdict of guilty of larceny, to prove that the property alleged to have been stolen was taken without the consent of the owner, yet it is not always required that such proof be by direct evidence. If all the facts and circumstances shown establish the fact of nonconsent, that will be held sufficient.
3. ———: **SENTENCE.** Plaintiff in error being found guilty of stealing property of the value of \$50, a sentence to the penitentiary for three years therefor *held* excessive, and reduced to two years.

ERROR to the district court for Nemaha county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed. Sentence reduced.*

E. B. Quackenbush and F. G. Hawxby, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

REESE, C. J.

Plaintiff in error was charged in the district court with the crime of burglary and larceny by breaking into

a store and stealing goods therefrom. He was tried for both offenses, and was found not guilty of burglary, but guilty of larceny; the value of the property found to have been stolen being fixed at \$50. He was sentenced to the penitentiary for a term of three years. From that judgment he prosecutes error to this court.

It is contended by plaintiff in error that the verdict of the jury is not supported by sufficient evidence: First, that there is no competent evidence that any property was stolen; second, that even if such were the case, it was not shown that plaintiff in error committed the theft; third, that the goods alleged to be stolen, and claimed to have been found in the possession of plaintiff in error, were not of sufficient value to constitute grand larceny; fourth, that there was no proof that the goods were taken without the consent of the owner.

Referring to the first, second and third of these contentions, the evidence shows that the store and the goods therein were owned by a firm under the firm name of Young & Klinger, situated in the village of Julian, in Nemaha county; that they employed three clerks; that on the 1st day of January, 1910, they were called to their telephone by the sheriff of Otoe county, and inquired of if they had lost any goods out of their store; that they and their clerks immediately commenced an investigation, and discovered, as they thought, that quite a quantity of their goods had been stolen. It is not necessary that we set out here a list of the goods that were discovered to have been abstracted, as quite a quantity of the contents of the store, consisting of clothing, jewelry, shoes, and groceries, were thought to have been taken. One of the members of the firm went to Nebraska City, where the sheriff of Otoe county held plaintiff in error and another in custody, when it was discovered that they had in their possession a number of articles corresponding in quality, appearance and make with the goods kept in the store, but none of them had any distinctive marks which indicated that they had constituted a part of

Nixon v. State.

Young & Klinger's stock, excepting a pair of drawers of a peculiar color, which were practically identified as having been a part of the stock of goods, and a finger ring, which was clearly identified. No witnesses could testify positively that the identified goods, or those that were missed from the stock, had not been sold by one of the proprietors or some of the clerks. It was shown that plaintiff in error, who was a stranger in the community, had been seen loitering around in the vicinity of Julian at or about the time the theft was committed, occupying empty box cars and a schoolhouse nearby, and the remnants of partly used property, empty cans and the like, similar to the missing goods, were found where plaintiff in error was shown to have been. The evidence was circumstantial. There was no proof of a breaking into the store building. Neither windows, doors, locks nor fastenings showed any signs of having been molested, but the evidence is clear enough that goods had recently been stolen from the store. Considering the whole case, we cannot say that there was not sufficient evidence to sustain the verdict of guilty of larceny.

Fourth: There was no direct proof that the goods were taken without the consent of the owners, but all the testimony of the proprietors and clerks strongly and clearly leads to the conclusion that no such consent was ever given. See *Johns v. State*, 88 Neb. 145. We find no reversible error in the record.

As we have seen, the verdict of the jury found the value of the stolen property to be \$50. This must be accepted as the true value. We are persuaded that the sentence is disproportionate to the offense, and excessive.

The judgment will therefore be modified by a reduction of the term of confinement to two years. As thus modified, the judgment of the district court is

AFFIRMED.

McNamara v. Gunderson.

**JAMES MCNAMARA, APPELLEE, V. PETER E. GUNDERSON,
APPELLANT.**

FILED APRIL 24, 1911. No. 16,324.

- 1. Process: NAMES UNKNOWN.** In law the name of a person consists of one given name and one surname; the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of either the given name or surname of such a one is to be ignorant of the person's name within the meaning of section 148 of the code.
- 2. Tax Foreclosure: CONSTRUCTIVE SERVICE: JURISDICTION.** In an action to foreclose a tax lien where there has been no administrative sale of the real estate, no personal service of summons, no appearance by any of the defendants, and the land itself is not made a party, if either the Christian or surname of the owner or the occupier of the premises is unknown, and there has been no attempt to comply with the provisions of section 148 of the code, the court is without jurisdiction to render a decree which will deprive the owner of his right of redemption.
- 3. EVIDENCE** examined, and found sufficient to sustain the judgment of the district court.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. Affirmed.

Wilcox & Halligan and J. A. Sheean, for appellant.

Hoagland & Hoagland, contra.

BARNES, J.

Action to redeem a quarter section of land, situated in Lincoln county, from tax sale and to quiet the title thereto. The plaintiff had the judgment, and the defendant has appealed.

It appears that the Union Pacific Railroad Company obtained a patent to the land in question from the United States; that one Katherine E. Farrell made a contract for the purchase thereof with the company, and assigned her contract to her daughter, Anna Elizabeth Farrell,

McNamara v. Gunderson.

who on the 24th day of June, 1891, married one George P. Stauduhr, of Rock Island, Illinois, where she has ever since resided; that she assumed the name of Anna Elizabeth Stauduhr, and ever since her marriage has been known by that name; that when she paid the purchase price for the land in question, according to the terms of the contract, the railroad company conveyed the same to her by warranty deed as Anna Elizabeth Farrell, because she was so named in the assignment of the contract; that her deed was duly recorded on the 5th day of November, 1906, in the deed records of Lincoln county, Nebraska; that on the 1st day of December, 1906, she, together with her husband, sold and conveyed the land to the plaintiff, James McNamara, and at that time there was nothing of record which showed that the defendant had any interest therein. It further appears that, while the title to the land was in the railroad company, certain taxes were assessed thereon; that they became delinquent, and on the 1st day of September, 1901, without any previous administrative sale, the county attorney of Lincoln county commenced an action in the district court to foreclose the lien for the delinquent taxes and subject the land to judicial sale for the payment of the same. The Union Pacific Railroad Company was not made a party to the action, although at that time it had the record title. Ann Elizabeth Farrell, ——— Farrell, her husband, first and real name unknown, Hy C. Wivill, John Doe, real name unknown, occupant, and Richard Roe, real name unknown, were the defendants named in the petition. There was an attempted service by publication, but no personal service whatsoever. There was no attempt to comply with the provisions of section 148 of the code, which reads as follows: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition,

McNamara v. Gunderson.

that he could not discover the true name, and the summons must contain the words 'real name unknown' and a copy thereof must be personally served upon the defendant." On the 15th day of April, 1902, a decree was rendered foreclosing the tax lien; sale of the premises was made by the sheriff under said decree to the defendant Peter E Gunderson by the name of "P" Gunderson; the sale was afterwards confirmed, and the sheriff executed and delivered to the defendant a deed to the premises, which was recorded in the deed records of Lincoln county on the 26th day of December, 1906. The defendant went into possession of the premises, and now claims to be the owner thereof under and by virtue of the sheriff's deed. It appears that neither the plaintiff nor his grantors ever had any actual notice of the pendency of the tax foreclosure proceeding, and the district court, upon the record and the evidence adduced at the trial, found that the tax foreclosure proceeding was void and insufficient to cut off the plaintiff's right of redemption, and rendered a decree allowing the plaintiff to redeem the premises from the tax lien upon the payment of the amount bid by the defendant at the foreclosure sale, together with interest, penalties, costs and the value of defendant's permanent improvements, from which was deducted the sum of \$70 as rents and profits while the defendant was in possession of the premises.

The defendant contends that the proceedings in the foreclosure suit were regular and the decree is not subject to collateral attack; while the plaintiff asserts that it was void for many reasons. If for any reason the decree in the foreclosure case was void, then the judgment appealed from must be affirmed. It is conceded that there is no element of estoppel in this case, and it is apparent that the record title to the land in question was in the railroad company at all times prior to the 5th day of November, 1906. Therefore the taxes which became delinquent and which were the basis of the foreclosure proceedings must have been assessed against that company. The record

owner against whom the property was assessed was not made a party to the foreclosure suit. The assignee of the sale contract was named in the petition as Ann Elizabeth Farrell, while her true name was Anna Elizabeth Stauduhr; the alleged occupant was described as John Doe, real name unknown, and the verification to the petition did not contain the statement required in such cases by the provisions of section 148 of the code. There was no personal service of summons and no appearance by any of the defendants and none of them had any actual notice of the pendency of the action. In *Gillian v. McDowall*, 66 Neb. 814, which was an action to foreclose a tax lien, it was held that, where the true name of a party is unknown, the proper course is to proceed under section 148 of the code by stating in the verification of the petition that the true name of the defendant could not be discovered, and obtain personal service upon him. It would seem that this rule should apply to the occupant of the premises in an action to foreclose a tax lien. As to the assignee of the sale contract, if she should be treated as the owner, which seems to have been the course pursued by the county attorney in the foreclosure suit, it appears that she was not sued by her true name, for two reasons: First, her real surname was Stauduhr, and not Farrell, and that fact could, without doubt, have been ascertained by proper inquiry; second, she was designated as Ann, while her first or Christian name was Anna. No explanation of this method of procedure, or the necessity therefor, was contained in the petition, neither was it referred to in the verification. We cannot presume that Ann Elizabeth Farrell is Anna Elizabeth Stauduhr or Anna Elizabeth Farrell; the two names are distinctly different, and no presumption arises that they are used to designate one and the same person. It has always been the rule in this state that in law the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of

Bolen v. Wright.

either the given name or surname of such a one is to be ignorant of such person's name within the meaning of section 148 of the code. *Enewold v. Olsen*, 39 Neb. 59. While we do not decide that a married woman may not be sued by the name she had previously borne, it is sufficient to say that, if an attempt is made to sue her by that name, both her former christian name and surname should be correctly stated; and if it is sought to deprive her of the title to her property in a tax foreclosure proceeding, without personal service of summons, and her land is not made a party, a failure in that respect will render a judgment cutting off her right of redemption subject to collateral attack. We are therefore of opinion that the district court rightly held that the decree in the tax foreclosure proceeding was not a bar to the plaintiff's right to redeem his land from the judicial tax sale.

This renders it unnecessary for us to determine any of the other objections to the tax foreclosure decree which have been presented by counsel for the plaintiff. No objection has been made that the decree in the instant case was insufficient in form or incorrect in amount. We are of opinion that the judgment of the district court was right, and it is

AFFIRMED.

FAWCETT, J., not sitting.

GILBERT R. BOLEN, APPELLEE, v. A. A. WRIGHT ET AL.,
APPELLANTS.

FILED APRIL 24, 1911. No. 16,403.

1. **Usury, Defense of by Partners.** Usury may be pleaded by one co-partner who, for a consideration, has assumed the payment of a partnership debt, and the debt of his copartner, for which he was personally liable as a member of the firm and as surety, although after the dissolution of the partnership he has renewed the note tainted with usury by the execution of one in his own name.

2. **Notes: BONA FIDE PURCHASER: BURDEN OF PROOF.** Where usury in the original transaction for which a negotiable promissory note has been given is proved, a party who claims to have purchased the note before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value, before maturity, and without notice.
3. **Usury: RELIEF IN EQUITY.** When a borrower goes into a court of equity to seek relief from an usurious contract, he should be required to pay the amount of the principal and lawful interest as a consideration for such relief, and it is the duty of the court in granting him relief to render a decree or judgment for the actual amount of the loan, with 7 per cent. interest thereon.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed with directions.*

Lambert & Winters and W. R. Patrick, for appellants.

T. A. Hollister, contra.

BARNES, J.

Appeal from a decree of the district court for Douglas county enjoining the collection of a promissory note and canceling a chattel mortgage given to secure its payment. The defendants contend that the trial court erred in allowing the plaintiff to interpose the plea of usury, and this question will be determined first in the order of the assignments.

It appears that the plaintiff and his brother, Ernest Bolen, were engaged as partners in the transfer business in South Omaha, Nebraska, under the name and style of Bolen Brothers, and on the 15th day of June, 1907, borrowed of the defendant Wright the sum of \$200, and gave a note therefor for \$210; the \$10 being for interest thereon at the rate of 5 per cent. a month. At the same time Ernest Bolen borrowed \$300 of the said defendant, and executed his individual note therefor for the sum of \$315; the \$15 being for interest at the rate of 5 per cent. a month. These notes were renewed from time to time and payments were made on them; the rate of interest charged

Bolen v. Wright.

each time and in all of the transactions being 5 per cent. a month until the amount of money received by the firm and by Ernest Bolen from the defendant Wright was the sum of \$870. On the 4th day of January, 1908, the whole transaction was merged in a note for \$913.50 signed by Bolen Brothers, and Ernest Bolen, in which was included the sum of \$43.50 as interest at the rate of 5 per cent. a month. This note was secured by a chattel mortgage upon the property of the Bolen Brothers Transfer Company. On the 1st day of May, 1908, Gilbert R. Bolen purchased from his brother, Ernest, his share in the Bolen Brothers Transfer Company, and has since conducted the business under the name of the Gilbert R. Bolen Transfer Company. On the 17th day of June, 1908, Gilbert gave Wright a note for the sum of \$827.90, and executed a chattel mortgage on his transfer company property securing the same. This note was a renewal of the note for \$913.50, less a credit of \$39.40 which also included interest at 5 per cent. a month. This note was renewed October 19, 1908. Thereafter, on the 15th day of February, 1909, plaintiff executed and delivered to the defendant Wright a new note for \$665.25, secured by a chattel mortgage on his property, which last named note and mortgage was a continuation of all of the former transactions, and was the balance due on the note given October 9, 1908, for the sum of \$827.90 after deducting a payment of \$162.35. It thus appears without question that the transaction from its inception, and in all of its parts, was tainted with the vice of usury.

It was claimed by the defendants that the plaintiff having purchased the interest of his brother in the transfer company, and having assumed the payment of his brother's share of the indebtedness in that transaction, is now estopped to plead usury, and is as a matter of law liable for the whole amount of the principal, together with the usurious interest as evidenced by the last note of \$665.25, which is the note in suit. In support of this claim defendants have cited a number of cases, com-

mening with *Cheney v. Dunlap*, 27 Neb. 401, and ending with *People's Building, Loan & Savings Ass'n v. Pickard*, 2 Neb. (Unof.) 144. From an examination of those cases, it appears that the controlling point in each of them was that the person seeking to interpose the plea of usury was a stranger to the usurious contract, and it was held: "A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract." *Cheney v. Dunlap, supra*.

It must be observed, however, in the case at bar that the plaintiff was not a stranger to the usurious transaction. At the time he purchased his brother's interest in the transfer company he was liable for the whole amount of the indebtedness as a member of the firm, and as surety for his brother. This case, therefore, should be ruled by *Beals v. Lewis*, 43 Ohio St. 220. In that case it appeared that A, B, and C were partners, and executed a promissory note to D, embracing usurious interest, and also executed to him a mortgage on real estate to secure the note. A conveyed to B and C his interest in the partnership property, including the real estate mortgaged; B and C agreeing in consideration thereof to pay the firm debts, including the debt to D. It was held: "That B and C were not estopped to assert such usury, in an action by D for the sale of the mortgaged premises." In *Machinists' Bank v. Krum*, 15 Ia. 49, it was said: "In an action against a copartnership upon a note tainted with usury, either partner may set it up as a defense, without the consent of his copartners. The defense may also be pleaded by one copartner who has for a consideration assumed the payment of the copartnership debt, and who has, under the dissolution of the copartnership renewed the note tainted with usury, by the execution of a new one, in his own name. *Aliter* as to a third party, who, for a consideration, has assumed the payment of a note thus tainted." This principle also seems to have been recognized by this court in *National Mutual Building &*

Loan Ass'n v. Retzman, 69 Neb. 667. We are therefore of opinion that the trial court rightly held that the plaintiff could avail himself of his plea of usury.

There is a further contention that the district court erred in finding that the defendant Caldwell was not a purchaser of the note in question before due, in good faith, and without notice of its usurious nature. We have read the testimony relating to this phase of the transaction, from which it appears that the defendants have for years occupied adjoining offices; that Caldwell had full knowledge of the chattel loan business conducted by the defendant Wright, and it is a significant fact that immediately after he claims to have purchased the note and mortgage in question, and some two months before it became due, without any apparent excuse therefor, he placed the same in his attorney's hands for immediate collection. Again, at the trial of this case he displayed no interest as to its result; and, considering his conduct in connection with the conduct of defendant Wright immediately before he claims to have sold the note in question to his codefendant, we are of opinion that Caldwell did not sustain the burden of proof which the law requires of him in such cases. Where usury in the original transaction for which a negotiable promissory note has been given is proved, a party who claims to have purchased the note before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value, before maturity, and without notice. *Darst v. Backus*, 18 Neb. 231; *Colby v. Parker*, 34 Neb. 510; *Knox v. Williams*, 24 Neb. 630; *McDonald v. Aufdengarten*, 41 Neb. 40.

Finally, it is contended by the defendants that, plaintiff having brought this action in equity for a cancelation of the note and mortgage in question, he should be required to do equity by paying the amount of money actually borrowed with the legal rate of interest thereon. We think the rule is that, where a borrower goes into a court of equity to seek relief from a usurious contract, he should be required to pay the amount of the principal and lawful

Bolen v. Wright.

interest as a condition for such relief, and it is the duty of the court in granting him relief to render a decree for the actual amount of the loan, with 7 per cent. interest thereon. *Eiseman v. Gallagher*, 24 Neb. 79. The plaintiff, having brought this action in a court of equity, should be required to do equity by paying the amount of money which was actually received from the defendant Wright, together with interest thereon at the rate of 7 per cent. per annum.

This holding requires us to ascertain the interest computed at the legal rate upon \$870, which it is conceded was the amount of money actually furnished to the plaintiff and his brother, Ernest, by the defendant Wright, and determine the amount legally due to the defendants; to compute the amount of the payments which have been made thereon by the plaintiff, and thus ascertain the balance due upon the note and mortgage in question. We have examined the evidence with care, and are satisfied that the computations of the district court are correct if no interest is allowed. By allowing defendants to recover interest at the legal rate, it appears that at the time the decree was rendered by the district court there was due to the defendants the sum of \$67.46. It follows that the judgment appealed from should be reversed, and it is so ordered, and the cause is remanded to the district court, with directions to enter a judgment in favor of the defendants and against the plaintiff for \$67.46, with legal interest thereon from the date of the former decree, and, upon the payment of that sum by the plaintiff to the clerk of the district court for the benefit of the defendants, the decree shall become operative as a payment of the note and a discharge and satisfaction of the chattel mortgage in question herein; and it is further ordered that each party shall pay the costs incurred by him in this court.

JUDGMENT ACCORDINGLY.

Deines v. Schwind.

**HENRY DEINES, APPELLANT, V. HENRY SCHWIND ET AL.,
APPELLEES.**

FILED APRIL 24, 1911. No. 16,420.

Appeal: Moot Question. Where, on the hearing of an appeal, it is disclosed that the record presents nothing but a moot question for the determination of the supreme court, ordinarily the proceeding will be dismissed or the judgment of the district court will be affirmed.

**APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Dismissed.***

George W. Berge, for appellant.

Harry A. Reese, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county in a proceeding where an application for a writ of habeas corpus was denied.

It appears that in 1893 the wife of the relator departed this life leaving two children and the relator surviving her. The youngest child, a girl, was at that time only three days' old. Certain informal proceedings were had by which the respondents adopted this child, took her to their home, and from thence to the present time have treated her as their own daughter. The relator has never contributed anything to her support, maintenance or education; and, although all of the parties have lived continuously in this state, relator had seen this child but twice in the 16 years prior to the commencement of this action. He claims to have made this application to obtain possession of his daughter because her education has been neglected. It appears, however, that the respondents have not been neglectful of their duty in that matter, but on the contrary have sent her to school and endeavored to give her an education suitable to her station

Sieker v. Sieker.

in life. It further appears that an illness which she suffered in her infancy so impaired her memory as to make all of their efforts of little or no avail. She appears to be able to assist her foster mother in the work about the house; she is in good physical health, is well cared for, is happy and contented, and desires to remain with her foster parents. It also appears that she is now more than 18 years of age, and, having arrived at her majority, is entitled to exercise her own choice and determine her abiding place for herself.

The record thus presents only a moot question for our determination. For this reason, we decline to further consider the questions presented by the record, and the proceeding is

DISMISSED.

REESE, C. J., and SEDGWICK, J., not sitting.

HEINRICH SIEKER, APPELLANT, V. AUGUST SIEKER, ADMINISTRATOR, ET AL., APPELLEES.

FILED APRIL 24, 1911. No. 16,392.

Vendor and Purchaser: CONTRACT: RESCISSION. Where parties have entered into a contract for the purchase and sale of real estate, they may afterwards by the destruction of the written paper evidencing the same, under an oral agreement that the contract shall be rescinded and thereafter held for naught, effectually do away with the previous agreement.

APPEAL from the district court for York county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

France & France, for appellant.

C. F. Stroman and Power & Mecker, contra.

LETTON, J.

This is an action for the specific performance of a written contract for the sale of real estate. The plaintiff, Heinrich Sieker, is the son of Karl Sieker, now deceased, and of Wilhelmina Sieker, who is the principal defendant. The full execution of the contract is denied, but we are satisfied that the evidence establishes the fact that in May, 1907, Karl Sieker and his wife, Wilhelmina, entered into a written contract, which was made out in duplicate and duly executed and acknowledged, for the sale to plaintiff of 80 acres of land which was occupied by them as their homestead. Karl Sieker died in December, 1907, leaving a will whereby he devised the land to his wife. After the father's death the duplicate contracts were destroyed. Plaintiff alleges that his mother and his brothers, August and Louis Sieker, fraudulently, against his will, and without his consent, obtained from him his copy of the agreement and wrongfully destroyed the same; while the defendants contend that both copies of the contract were destroyed with his knowledge and consent, and with the full intention on the part of plaintiff and of all the parties interested that the sale should not be consummated, but that the contract should be rescinded and revoked, all the rights of plaintiff thereunder abandoned, and the money which had been paid by him on the contract returned to him. This is one of the not uncommon cases of family differences and disputes arising over the disposition of property, which are ordinarily productive of more bitterness and hard feeling than any other class of cases. The older members of the Sieker family seem to side with the plaintiff; while the younger members take the part of the mother. Since we believe the contract was valid, the only question left is whether it was voluntarily and by mutual consent rescinded and abandoned.

The testimony of plaintiff is that in June, 1908, while he was still living at the family home, his mother, acting

on her own suggestion, procured his duplicate copy of the contract and burned it in his presence, but without his consent.

His mother's testimony, which was taken with the aid of an interpreter, is in substance that the sale of the 80 acres was made by the parents to Heinrich for the purpose of procuring money with which to buy a larger tract of land; that through an unforeseen contingency the purchase of the other tract fell through, the family were unable to obtain possession, and were liable to be without a home; that after the father's death she and Heinrich had a conversation, and Heinrich told her that father had died and she could have the land back, that he did not want to keep it, to which she assented; that a day or two after this, in the presence of her sons, August and Louis, and her daughter, Wilhelmina, she asked Heinrich what to do with the contracts; that he said they could burn them up; that he then went into his room and brought his copy, and she got hers. She was sitting by the stove; he gave her his copy, and she then, with his knowledge and consent, put both copies in the stove and burned them up. She also testifies that, in repayment of the \$500 which had been paid by Heinrich on the contract, she paid him \$150 in May, 1908, which he wanted for the purpose of buying a horse, and in September of the same year she paid the remaining \$350. Heinrich admits the payment of the \$350, but explains it by saying that \$200 of it was for rent, and \$150 for borrowed money, and he denies receiving the \$150 which she testifies was paid him in May. The testimony of the mother as to the conversation attending the destruction of the contract is directly corroborated by that of August, Louis, and Wilhelmina, who were present at the time. There is other testimony as to collateral matters tending to throw some light on the issue, but this is also in conflict and requires no discussion. The district court found generally for the defendants, and plaintiff appeals.

While we agree with the plaintiff that the simple burn-

ing up of a contract whereby an interest in real estate has passed to another does not in any way rescind the contract, we are convinced that there is something more in this case than the mere destruction of the papers. We are satisfied from the evidence that it was the intention of plaintiff at the time he procured his copy of the contract, delivered it to his mother, and consented to its destruction, to rescind and abandon the contract and allow his mother to retain her home, and that his purpose to do so was as certainly evidenced by the surrender and destruction of the paper as it would have been had he executed a written release or revocation. We think it is now settled law that, where parties have entered into a contract for the purchase and sale of real estate, they may afterwards by the destruction of the written paper evidencing the same, under an oral agreement that the contract shall be rescinded and thereafter held for naught, effectually do away with the previous agreement. The destruction of the written contract with the intention of revesting the title in the original owner will be held in equity to have as much effect as a written conveyance. *Spier v. Schappel*, 86 Neb. 335; *Ottow v. Fricse*, 126 N. W. (N. Dak.) 503; *Mahon v. Leech*, 11 N. Dak. 181; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027; 2 Warvelle, Vendors (2d ed.) sec. 826.

The witnesses are for the most part of German parentage, with but a superficial knowledge of the English language. The plaintiff is handicapped by this, and also apparently by a lack of knowledge of ordinary business affairs. The district court had all the parties before it, and, no doubt, was better able to determine the truth or falsity of their testimony than we are. From the record before us, we feel satisfied that the conclusion of the district court was correct. Its judgment is therefore

AFFIRMED.

DENNIS KELEHER, APPELLEE, v. MARY KELEHER KELLY ET AL., APPELLANTS.

FILED APRIL 24, 1911. No. 16,404.

1. **Tenancy in Common: ADVERSE POSSESSION: LIMITATIONS.** The statute of limitations will begin to run in favor of a cotenant in possession claiming title in himself to the entire estate as against the other cotenants, as soon as knowledge of the fact that he is in possession asserting that he owns the entire estate, hostile and adverse to any claim of right in them, is clearly brought home to them.
2. **Limitation of Actions: RIGHTS OF HEIRS.** Where the right to bring an action to recover land is barred by the statute of limitations during the lifetime of one claiming title to the same, the right of his heirs is also barred.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

T. J. Doyle and G. L. De Lacy, for appellants.

L. C. Burr and C. C. Marlay, contra.

LETTON, J.

Margaret Keleher died intestate in 1881, in Lancaster county, Nebraska, leaving children surviving her as follows: Dennis Keleher, the plaintiff; Patrick Keleher, the father of defendants Keleher; Michael Keleher, who afterwards died unmarried and intestate; and Mary Brassel, now deceased, the mother of defendants Brassel. At the time of her death Margaret Keleher owned a homestead of 80 acres of land in the same county. Administration was had of the estate the plaintiff being appointed administrator. In the administration proceedings it became necessary to sell the real estate to pay the debts of the deceased. Application was made to the district court, a license was issued and the land sold to one Malone. Immediately afterwards Malone conveyed the premises to

Keleher v. Kelly.

plaintiff. This deed was placed on record on December 2, 1882. In September, 1884, Patrick Keleher and Mary Brassel began an action in the district court for Lancaster county against the plaintiff, Mike Keleher, and James Malone, alleging that each of the plaintiffs was the owner of an undivided one-fourth interest in the premises, and specifically pleading the invalidity of the proceedings whereby the plaintiff acquired the alleged title to the premises. This action was afterwards dismissed for failure to give security for costs. Patrick Keleher died in 1905. Plaintiff has been in the actual, open, and notorious possession of the land claiming title to the entire estate ever since his deed from Malone was placed upon record in December, 1882. He has paid the taxes accruing, and has made some slight improvements.

This action was brought by him to quiet his title. Those of the defendants who are the heirs of Patrick Keleher filed an answer and cross-petition, alleging the invalidity of the administration proceedings; that their father was the owner of an undivided one-third interest in the land, and praying that this interest may be quieted in them. The Brassel heirs filed no answer.

That Patrick Keleher and Mary Brassel knew in 1884 that the plaintiff was claiming the entire title to the land as against them, and each of them, and that he was in actual possession of the same, is shown by the fact that they began an action against him, alleging these facts. For 20 years after they had this knowledge, they left the plaintiff in quiet and undisturbed possession. The doctrine of cotenancy has no application where one cotenant virtually ousts the others and actively asserts a hostile title in himself of which they have full notice. The right of action of Patrick Keleher, through whom defendants claim title, had been barred by the statute of limitations for more than 10 years before he died. This was an effectual bar as against any cause of action on their part. *Ballou v. Sherwood*, 32 Neb. 666; *Lyons v. Carr*, 77 Neb. 883.

Flesner v. Steinbruck.

The judgment of the district court is clearly right, and it is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

**FREDERICK O. FLESNER, APPELLEE, V. GEORGE STEINBRUCK,
APPELLANT.**

FILED APRIL 24, 1911. No. 16,808.

1. **Waters: PREVENTING NATURAL DRAINAGE.** Every interference by one landowner with the natural drainage to the injury of the land of another is unreasonable, if not made by the former in the reasonable use of his own property.
2. ———: ———. It is not a reasonable use of one's property to construct a dike across a natural drain upon farm lands for the sole purpose of preventing the flow of unpolluted water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted.
3. ———: **CHANGING COURSE OF DRAINAGE.** A lower proprietor has no lawful cause for complaint because the upper proprietor, in the exercise of good husbandry, by the use of ditches changes the course of drainage upon his own premises, but permits the water to flow without an appreciable increase in volume upon the servient estate in a natural drain, where it would have appeared if the ditches had not been constructed.
4. ———: ———. If an upper proprietor, in the interest of good husbandry, and without negligence, collects in a ditch surface water, which formerly spread over his premises, and accelerates its flow in the natural course of drainage through a natural drain onto the lands of his neighbor, he is not liable therefor.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

Paul E. Boslaugh and O. H. Sloan, for appellant.

A. O. Epperson and L. B. Stiner, contra.

Root, J.

This is an action for an injunction to restrain the defendant from interfering with the flow of water. The defendant asked for an injunction to restrain the plaintiff from discharging water upon the defendant's premises. The plaintiff prevailed and the defendant appeals.

The plaintiff is the owner of the southeast quarter of section 26, and the defendant owns the west half of the southwest quarter and the south half of the northwest quarter of section 25, in town 7, range 8, in Clay County. There is a public highway between the respective farms. The plaintiff purchased his property in 1892, and the defendant acquired his farm by inheritance in 1902 or 1903. These farms, and the other tracts of land in their vicinity are flat, but there is a slight depression about 12 inches lower than the surrounding territory in the east half of section 26 wherein the surplus water accumulates. In a state of nature this water would flow north and east so as to cross the section line north of the east quarter corner, from thence it would pass on to the defendant's land into a sag, and after that depression was filled the water would spread north and east over the surrounding land. About 40 rods east of this sag there is another shallow basin, and about 120 rods further eastward there is a draw. These sags are dry the greater part of the year, the beds are cultivated, and crops are usually grown therein. More than ten years before this suit was commenced, the plaintiff constructed, and subsequently has maintained a shallow ditch parallel and close to the northern boundary of his farm from a point on the highway westward about 100 rods, and from that point southwestward to the west line of his farm. This ditch diverts water from the sag so that it will flow to the highway about 140 yards south of the point where it would otherwise pass from section 26, but it continues northward on the west side of the highway to the point where it has ever flowed onto section 25. Until about four years be-

Flesner v. Steinbruck.

fore this suit was instituted, the highway was not worked, but in 1904 it was graded, ditches were cut on either side of the grade, and a 12 inch tile was laid across the way at the point where the testimony shows the water has always crossed the section line. The defendant dammed the plaintiff's ditch at the point where it emerged from the field, plugged the tile, and subsequently built a straw stack on his own premises on the line of the highway and opposite the culvert where assembled storm waters have flowed since the memory of man runs not to the contrary. The defendant justifies his conduct on the ground that the ditches and the culvert cause a greater amount of water to flow upon his premises than would be cast thereon if no such improvements had been made, and that he is protecting himself against a common enemy, surface water.

The plaintiff, on the other hand, asserts that the natural course of drainage for a considerable territory, including his farm, is along a line which is covered by the straw stack; that no more water has been cast upon the defendant's premises than it would have received if the prairies had remained unbroken; that by constructing a ditch at a slight expense the defendant can relieve his land of the water of which he complains; and that he has acted maliciously for the sole purpose of injuring the plaintiff. The plaintiff also pleads that the defendant's father for many years recognized the plaintiff's right of drainage over the premises now owned by the defendant, and that he acquired his heritage subject to an easement of drainage appurtenant to the plaintiff's premises.

We are satisfied with the court's finding that there is a natural tendency for the water falling upon section 26 to flow along the line marked by the culvert in the highway and onto section 25. The defendant does not have an unqualified right to exclude surface water from his premises, but, if he exercises that privilege, must use ordinary care so as to not unnecessarily injure his neighbor. This principle of law has been repeatedly announced by

this court. Our former decisions on this point are referred to in *Conn v. Chicago, B. & Q. R. Co.*, 88 Neb. 732. In considering this subject in *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179, the New Hampshire court, by Bartlett, J., say: "As in these cases of the water-course, so in the drainage, a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others. The rights are correlative, and from the necessity of the case the right of each is only to a reasonable user or management; and whatever exercise of one's right or use of one's privilege in such case is, under all the circumstances, and in view of the rights of others, such a reasonable user or management, is not an infringement of the rights of others; but any interference by one landowner with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable. Every interference by one landowner with the natural drainage, actually injurious to the land of another, would be unreasonable, if not made by the former in the reasonable use of his own property."

The defendant was not protecting his own premises against the flow of diffused surface water or of polluted water. The water had been assembled by the force of gravitation, and was flowing in a body in the course of natural drainage before it reached his premises. The obstructions interposed by the defendant were not mere incidents accompanying improvements which he was making upon his own premises, but they were created for the sole purpose of preventing the movement of water in a natural drain provided by nature and utilized by his neighbors for the drainage of the surrounding territory. In constructing dikes in the path of that drain and in the highway, and by filling in the culvert that was laid for the purpose of improving the public way, the defendant was not, in the light of the evidence in this case making a reasonable use of his own property.

The defendant contends that the plaintiff by constructing the ditch along the northern boundary of his farm

Flesner v. Steinbruck.

unlawfully diverted the water from its natural course to the defendant's field; but the fact is that the water reaches that field at the identical point where it would appear but for this ditch. Although the ditch along the western side of the highway is employed to withdraw the water from the plaintiff's field and from his neighbor's farm to the north, the water is returned to its course before it reaches the defendant's premises. The plaintiff and his neighbor to the north have title to the west half of the highway subject to the easement of the public, the highway officials make no objection, and the defendant has no just ground for complaint on this score.

It may be that the ditches and the culvert accelerate and slightly increase the flow of water upon and over the defendant's premises, although there is evidence to the contrary. Assuming for the sake of argument that such is the fact, there is no evidence to sustain a finding that those improvements were negligently constructed or are improperly maintained, but the evidence clearly proves that they are in the interest of good husbandry and are necessary for the improvement of the highway, and that the defendant at a slight expense to himself may not only pass on this water, but as well the water which flows from his own fields into this sag. The plaintiff therefore was within his rights. *Aldritt v. Fleischauer*, 74 Neb. 66; *Manteufel v. Wetzel*, 133 Wis. 619, 19 L. R. A. n. s. 167.

A careful consideration of the record convinces us that the judgment of the district court is right, and it is

AFFIRMED.

WILLIAM HAFFKE ET AL., APPELLEES, v. H. J. COFFIN ET AL., APPELLANTS.

FILED APRIL 24, 1911. No. 16,383.

1. **Damages: PENALTY.** Ordinarily a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation whereof is to cover the damages which the party, in whose favor the stipulation is made, may sustain from a breach of the contract by the opposite party.
2. **Indemnity Bond: BREACH: PLEADING AND PROOF.** In an action upon a bond of indemnity, it is incumbent upon the plaintiff to plead and prove, not only a breach of the contract, but the amount of damages he has sustained thereby.
3. **Estoppel: RECITALS IN BOND.** A recital in a bond, given to secure the performance of an antecedent contract for the exchange of real estate for personal property, that the chattels are of the agreed and stipulated value of \$4,500, is not contractual in its nature, and does not estop either party from proving the actual value.

**APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed.***

E. J. Clements and O. E. Foster, for appellants.

O. E. Herring and C. Haffke, contra.

ROOT, J.

In December, 1907, the plaintiffs entered into a written contract to transfer "their livery and hack business located in the city of Omaha," to W. P. Thorp and Charles I. Bragg for the consideration of two quarter sections of land in Loup county. Thorp and Bragg were to convey this land to the plaintiffs, and were also to furnish "a merchantable abstract" of title; the title deeds were to be placed in escrow "until the abstract is approved by the parties of the first part."

The plaintiffs delivered their chattels to the defendant H. J. Coffin, who was interested in the transaction. They

Haffke v. Coffin.

approved the abstract of title and accepted the deed for one quarter section of land, but did not approve the abstract of title or accept the deed for the other tract. Thereupon in January, 1908, the defendants executed and delivered to the plaintiffs the bond in suit, which is as follows: "Know All Men by These Presents: That H. J. Coffin, as principal, and the National Fidelity & Casualty Company, as surety, are held and firmly bound unto Charles Haffke and William Haffke in the sum of two thousand five hundred dollars (\$2,500) for the payment of which well and truly to be made we do bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents, upon condition as follows:

"Whereas, the said H. J. Coffin has sold and agreed to convey unto said Charles Haffke and William Haffke, for the consideration of two thousand and five hundred dollars (\$2,500) the following described premises, to wit: The north half of the northwest quarter of section twenty-six (26), and the north half of the northeast quarter of section twenty-seven (27), in township twenty-one (21) north of range nineteen (19) west of the sixth principal meridian, in Loup county and state of Nebraska; and the said Charles Haffke and William Haffke have purchased said premises, and have made payments therefor as follows: By delivering to said H. J. Coffin chattels and personal property of the agreed and stipulated value of four thousand five hundred dollars (\$4,500), one-half of which has this day been paid.

"Therefore, the condition of this obligation is such that if the above bounden H. J. Coffin and National Fidelity & Casualty Company, of Omaha, Nebraska, will perfect the title to said premises, furnish to said Charles Haffke and William Haffke an abstract of title thereof showing a good and perfect title to said premises in the said H. J. Coffin, to be approved by Guy R. C. Read, Esquire, of Omaha, Nebraska, and will convey said premises by deed of general warranty, and clear of all incumbrances, unto the

Haffke v. Coffin.

said Charles Haffke and William Haffke on or before the first day of October, 1908, then this obligation to be void, otherwise to be and remain in full force and effect."

The plaintiffs plead a breach of the bond as follows: "That default has been made in the conditions stated in said bond and defendants have failed and neglected to perfect the title to said premises, and have failed and neglected to furnish the plaintiffs an abstract of title thereof showing a good and perfect title to said premises in the said H. J. Coffin, approved by the said Guy R. C. Read; and have failed and neglected to convey said premises by deed of general warranty, clear of all incumbrances, unto the said plaintiffs, on or before October 1, 1908." There is no allegation of the value of the tract of land, nor that the plaintiffs have been damaged, but they plead that there is due them from the defendants \$2,500, for which, with interest from October 1, 1908, and costs of suit, they pray judgment.

The defendants answered, admitting the execution of the bond; alleged that the chattels transferred by the plaintiffs in consideration for the real estate were not worth to exceed \$1,600; that the title to the quarter section of land which had not been accepted by the plaintiffs had been perfected according to the requisitions of the plaintiffs' counsel, but that they refused to accept the deed or the abstract. The reply traverses these allegations. The cause was tried to the court, and it found that the \$2,500 mentioned in the bond was intended by the parties as liquidated damages, and gave judgment for that sum, with interest. The defendants appeal.

Although there is no specific agreement in the bond that \$2,500 shall be taken and considered as the amount of damages the plaintiffs will sustain for a breach of that instrument, plaintiffs assert that the damages flowing from the defendants' failure to perfect title to the land are uncertain, and it is evident from an inspection of the undertaking that the parties thereto adjusted the question of damages, agreed upon the value of the land in ad-

vance of the sale, made that value of the essence of the contract, and are estopped to controvert that fact, but have irrevocably elected to pay \$2,500 in lieu of transferring title to the land. The contract to trade contains no stipulation as to the value of either tract of land or of the plaintiffs' personal property so that an agreed valuation for the property to be exchanged was not an inducing cause or consideration for this contract. The bond evidently was not within the contemplation of the parties at the time the contract to trade was entered into. Subsequent developments probably suggested the necessity for some security, other than the personal responsibility of Thorp and Bragg, that the title to the quarter section of land which the plaintiffs did not accept should be perfected, and the bond in suit was given to the end that the defendant Coffin might perfect that title and the chattels might be delivered.

There is no specific agreement in this bond that \$2,500, or any other sum, is agreed to as liquidated damages, or that if the title is not perfected, or the abstract is not furnished, or the title is not conveyed, or that if there is a total failure to perform, the plaintiffs' damages shall be taken and considered to amount to \$2,500, or to any other sum. There is nothing in the bond or in any evidence extrinsic thereto to suggest that the property transferred by the plaintiffs was of so unusual a character that it would be difficult to prove its value, nor is there anything in the record tending to prove that the market value of the land or the value of an abstract of title thereto cannot easily be ascertained by recourse to evidence, nor are we advised that any incumbrance that may exist upon the land or any imperfections in the title cannot be removed, or that the depreciation in value of the title by reason of their existence cannot readily be ascertained. In fact, there is neither allegation nor proof that the transaction under consideration is different, except as to the special features that might inhere in any contract to trade, from scores of contracts entered into within this state every

week in the year. In the light of these facts, should the bond be construed as an agreement to pay liquidated damages?

This subject was discussed in *Brennan v. Clark*, 29 Neb. 385, and the court, speaking through MAXWELL, J., say: "In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum in case of default by one of the parties is to be considered as a penalty or liquidated damages, the court will consider the subject matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts, which damages are certain or can be ascertained by evidence, the stipulated sum is considered as a penalty; but, where the acts or omissions occasioning damages are not susceptible of measurement by a pecuniary standard, the sum stipulated ordinarily will be regarded as liquidated damages." This case was approved and followed in *Squires v. Elwood*, 33 Neb. 126; *Gillilan v. Rollins*, 41 Neb. 540; and *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681. See, also, *Davis v. Gillett*, 52 N. H. 126; *Cimarron Land Co. v. Barton*, 51 Kan. 554; *Kelley v. Seay*, 3 Okla. 527, 41 Pac. 615; and *Tayloe v. Sandiford*, 7 Wheat. (U. S.) *13.

Counsel for the plaintiffs urge that the case at bar should be ruled by *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642. The opinion was written by the present chief justice of that court, and contains an interesting discussion of the law. In that case the parties had agreed in the contract, which the bond was given to secure, that the value of the yacht chartered should, for the purpose of the charter, be considered and taken at the sum of \$75,000, and that the vessel should be returned in good condition or paid for. The vessel was lost at sea and never returned to the owner. Mr. Justice White says that parties may contract for liquidated damages for the breach of a contract, and if the court, upon a fair

Haffke v. Coffin.

consideration of that contract, is convinced that such a stipulation was made, should enforce it. In satisfying himself that the parties intended to so agree, the learned justice mentions as one potent fact that the yacht had no market value. In the instant case the property to be conveyed, and the consideration therefor, had a market value, and, according to the testimony produced, the land is worth not to exceed \$800. The expense of procuring an abstract would probably not exceed \$50, and it is not consonant with reason to say, in the absence of specific language to that effect, that the parties intended the defendants should pay \$2,500 for the failure to perform any one or all of the conditions of this bond.

Counsel argue that there is a stipulation in the undertaking that the personal property was worth \$4,500. There is a statement to this effect, but it plainly refers to a past transaction, the agreement to trade, and forms no part of the consideration for the execution of the bond, so as to estop the defendants from making proof of the fact. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 60 Neb. 636; *Fagan v. Hook*, 134 Ia. 381.

Upon a consideration of the entire bond and the contract which it was given to secure, we are of opinion that this case should be ruled by *Brennan v. Clark*, *supra*. The testimony with respect to a breach of the bond is evasive, and suggests that, although an abstract showing perfect title in the plaintiffs or their grantors was not delivered October 10, 1908, it was delivered on some other date. It may be that the plaintiffs have been damaged in the sum of \$2,500, but they have neither pleaded nor proved that fact.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

HARVEY M. HAWKINS, APPELLEE, v. ANDES N. COLLINS, APPELLANT.

FILED APRIL 24, 1911. No. 16,398.

1. **Negligence: SETTING OUT FIRE.** One who sets out a fire on his own premises without taking such precautions as a reasonable man should to prevent it from spreading to his neighbor's premises is negligent, and the fact that 48 hours intervened between the setting out of the fire and the time it spread to those premises does not in itself necessarily acquit him of negligence.
2. **Evidence of Value.** In an action for damages for the destruction by fire of a barn, granary and personal property, the owner is *prima facie* qualified to testify to the value of his property.
3. **Appeal: VARIANCE.** Proof that the defendant's negligence caused the death of plaintiff's colt is not a material variance from an allegation that by reason of that negligence the plaintiff lost a horse.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

R. J. Millard, for appellant.

J. C. Robinson, *contra*.

ROOT, J.

This is an action for damages caused, as alleged, by the defendant's negligent failure to properly watch and care for fire kindled by him upon his own premises, and which subsequently spread to the plaintiff's farm and destroyed his property. The plaintiff prevailed, and the defendant appeals.

The only errors argued in the brief relate to the admission of testimony and the sufficiency of the evidence to sustain the verdict. The subjects are closely related and will be considered together.

The testimony is conflicting concerning the defendant's negligence; but, since the jury found for the plaintiff, we must consider the evidence in the light most favorable

to him. As thus considered, it will sustain the theory advanced by the plaintiff that the defendant set fire to two old straw stacks, or "butts," and that he negligently failed to control it, but negligently permitted it to smoulder and burn until by a change in the direction and the velocity of the wind a fire was kindled in the dry stubble in the field surrounding the stacks, and thereby the fire spread to the plaintiff's premises and destroyed his property. The defendant had burned the stubble for a distance around the stacks, but the increased velocity of the wind was evidently sufficient, not only to fan the smouldering embers into a blaze, but also to carry some of them beyond the fire-guard. There was nothing extraordinary in the change of direction or velocity of the wind, no more than might be expected at that season of the year in Nebraska.

The defendant does not argue that these elements constituted an intervening cause sufficient to excuse his negligence, but stoutly contends that the fire spread from a straw stack which was set on fire by some unknown cause. The defendant had the right to destroy by fire the stacks and remnants of stacks which encumbered his field, but fire is a dangerous element, and, when used, the law charges the party employing it to an exercise of reasonable care and caution to care for and control it so that it shall not spread to his neighbor's premises, and if he fails to exercise that care, he is liable for damages caused thereby. The fact that two days intervened between the kindling of the fire and the time it spread to the plaintiff's premises did not of necessity break the causal connection between the defendant's negligence and the destruction of the plaintiff's property; the defendant's duty to exercise reasonable prudence to control the fire until it was extinguished or rendered harmless to his neighbor was a continuing duty which was not discharged so long as the fire existed. *Krippner v. Biebl*, 28 Minn. 139; *Haverly v. State Line & S. R. Co.*, 135 Pa. St. 50; *Allen v. Bainbridge*, 145 Mich. 366.

The plaintiff, by reason of his relation to the property as its owner and his intimate acquaintance therewith,

Woodward v. Woodward.

was qualified to testify to its value. *Hespen v. Union P. R. Co.*, 82 Neb. 495. The fact that one animal is referred to in the petition as a horse, but is described in the testimony as a colt, is an immaterial variance in nowise prejudicial to the defendant, and should not reverse the judgment. Code, sec. 145.

The other matters referred to in the brief are not material or of sufficient importance, as we understand the record, to justify further extending this opinion. The case was fairly submitted to the jury, and its verdict, rendered upon conflicting evidence, should be sustained.

AFFIRMED.

JAMES C. WOODWARD, APPELLANT, v. CAROLYN D. WOODWARD, APPELLEE.

FILED APRIL 24, 1911. No. 16,413.

1. **Trusts: RESULTING TRUST: HUSBAND AND WIFE.** Where, upon a purchase of real estate, the legal title is taken in the name of a woman, while the consideration or part of it is paid by her husband, but not by way of a gift or a loan to her, a resulting trust immediately arises from the transaction, unless it would be a fraud to enforce that trust, and the wife will hold the title in trust for her husband to the extent that he paid the purchase price of the property.
2. ———: ———: ———. And if part of the purchase price is evidenced by the husband's note secured by a mortgage upon the real estate, which he subsequently pays, the note should be considered as a part payment made at the time it was executed, and to that extent will enlarge his estate.
3. ———: ———: ———. The fact that the property was purchased upon an express oral agreement of the wife to hold it, or any part thereof, in trust for him does not destroy the trust arising from the transaction, but should be considered as tending to rebut the presumption that the money was paid as a settlement upon her.
4. ———: ———: **ENFORCEMENT: SUPPLEMENTAL PLEADINGS.** If, pending litigation between the husband and wife, she is divorced and secures a judgment for alimony, the fact may be pleaded by supplemental answer, and the court should impress the trust estate with a lien to satisfy the judgment, unless other equitable considerations intervene to defeat that relief.

APPEAL from the district court for Polk county:
GEORGE F. CORCORAN, JUDGE. *Reversed with directions.*

Mills, Mills & Beebe and Hastings & Coufal, for appellant.

Matt Miller and J. B. Pospisil, contra.

Root, J.

This is an action to establish a trust in real estate. The defendant prevailed, and the plaintiff appeals.

The parties were formerly husband and wife, but that relation ceased after this action was commenced. The plaintiff pleads the purchase in succession of three tracts of real estate, and that the legal title thereto was vested in the defendant upon an agreement on her part to hold the title in trust for him to the extent that he contributed to the purchase price; that the last tract, which is the subject of this litigation, cost \$3,200, and that he contributed \$1,500 to the purchase price and expended \$250 in improving the premises. The answer is in the nature of a general denial.

Counsel for plaintiff insist that this pleading contains a negative pregnant which admits the contract, but we are satisfied that the litigants and the trial court considered those allegations as traversed by the answer, and we shall so construe the pleading. If any agreement were made, it was oral, and it is not contended that by any act of the parties that agreement has been taken out of the statute of frauds. Plaintiff's counsel concede that their client's case must stand or fall upon the law with respect to resulting trusts.

We do not think the evidence justifies a finding that the plaintiff paid any part of the purchase price of the lots first bought, although he expended considerable money in repairing and beautifying the property. The proceeds of the sale of this property eventually were in-

vested in the second tract herein referred to; the contract for this property was made in the plaintiff's name, but the deed which was subsequently executed is to the defendant. The proof is satisfactory that the plaintiff paid \$300 of the first payment upon this property, and that he subsequently paid \$300 of the incumbrance thereon, which was evidenced by a note signed by the plaintiff, as well as by the defendant. This property was also sold, and the proceeds were invested in the property involved in this litigation.

The proof satisfies us that the plaintiff paid \$200 on the first payment made on this property. The plaintiff also contends that he expended money for repairing and improving this property, but the amount thus expended is not satisfactorily established by the evidence, nor would it be material for the purpose of establishing the trust. While the defendant denied that she held the property, or any part thereof, in trust for the plaintiff, and denied having agreed to so hold it, she admits that previously, upon an agreement to live apart from him, she paid him \$1,200 for his interest in this property, and that subsequently, having been reconciled, he returned the money. We are not inclined to accept this amount as the measure of the plaintiff's contribution to the purchase price of the property, because other elements of consideration may have entered into this payment, but we think this admission by her so corroborates him that we should hold that the money he contributed to the purchase of this property should not be considered as a settlement in her favor, but that, if no principle of law prevents, we should grant him relief.

The rule is well stated: "Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration or a part of it is given or paid by another, not in the way of a loan to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction (unless it would be enforcing a fraud to raise a resulting

trust), and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." 1 Perry, Trusts (6th ed.) sec. 126. And where the *cestui que trust* subsequently pays his note representing part of the purchase price, but secured by a mortgage upon the land, the note will be considered as a payment made at the date of the conveyance, and his estate will be enlarged to that extent. *Leonard v. Green*, 34 Minn. 137. If the money is paid by a husband and the title taken in the name of his wife, a settlement, and not a resulting trust, will be presumed, but the presumption may be rebutted and the trust enforced. *Persons v. Persons*, 25 N. J. Eq. 250; *Duvale v. Duvale*, 54 N. J. Eq. 581. The fact that an unenforceable oral contract was made between the parties with respect to the trust estate does not defeat the resulting trust which the law creates in favor of the husband, but should be ignored, except in so far as it may rebut the presumption of a settlement. *Smithsonian Institution v. Meech*, 169 U. S. 398. The property in litigation was purchased for \$3,200; the plaintiff paid \$800 of the purchase price, and the defendant holds an undivided one-fourth part of the title in trust for him. It was stated at the bar that the defendant, subsequent to the commencement of this action, recovered a judgment against the plaintiff for alimony. This judgment is not a lien upon an equitable title, nor, since the plaintiff is not in possession of the property, can it be sold upon execution. *First Nat. Bank v. Tighe*, 49 Neb. 299. However, this is an action in equity, and, if a trust is established in the plaintiff's favor, it should be impressed with a lien to satisfy her judgment, should she by supplemental answer set up that judgment, if other equitable considerations do not forbid that relief.

The judgment of the district court, therefore, is reversed, with directions to enter a judgment declaring a trust in the plaintiff's favor to an undivided one-fourth part of the property described in the action, but the defendant is given permission to so amend her answer as

Hoover v. De Klotz.

to plead her judgment for alimony against the plaintiff, and the court is directed to make such order with respect thereto as may seem just and equitable.

REVERSED.

MERTON D. HOOVER, APPELLEE, v. JOSEPH DE KLOTZ, APPELLANT.

FILED APRIL 24, 1911. No. 16,415.

1. **Assault and Battery: RIGHT OF RESISTANCE: LIABILITY FOR DAMAGES.** A person unlawfully assaulted is not bound to retreat to the wall before he may lawfully resist the aggressor with such force as may seem reasonably necessary for his own protection. If, being unlawfully assaulted, he instinctively interposes between himself and the aggressor an edged tool, which the assailant comes in contact with to his injury, the person attacked is not liable in damages therefor.
2. **Trial: WITHDRAWAL OF ISSUE FROM JURY.** If an affirmative defense is supported by sufficient competent evidence, it is error for the court to withdraw that defense from the jury.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

W. B. Comstock, for appellant.

Tibbets & Anderson, contra.

ROOT, J.

This is an action for damages for an assault and battery. The plaintiff prevailed, and the defendant appeals.

The defendant pleaded self-defense, and that, while he was interposing a meat cleaver between himself and the plaintiff, the latter struck the instrument and wounded himself. The plaintiff's testimony that the defendant made an unprovoked assault upon him with a cleaver is corroborated by other evidence. The defendant's testi-

mony that, as the plaintiff suddenly attacked him, he instinctively interposed the cleaver, and the plaintiff struck his arm thereon to his injury, is also corroborated by other testimony. The plaintiff is larger and more powerful than is the defendant, and the parties during the affray occupied common ground.

The court on its own motion instructed the jury as follows: "If one attacks another with a dangerous weapon, without just cause, and that other is injured, then the attacking party must respond to the party attacked in damages. On the other hand, when a person is attacked, it is his duty to flee, if he can do so with safety to himself, before he would kill the attacking party, or inflict upon that party great bodily injury. In other words, as the books have it, the party attacked must retreat to the wall. But by this is not meant that a party must always flee, or even attempt flight. The circumstances of the attack might be such, the weapon with which he is menaced, of such a character, that retreat might well increase his peril. By retreating to the wall is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of striking his assailant avoided. But, if the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need not retreat." This instruction purports to state the conditions upon which the defendant may justify his conduct. The instruction is not applicable to the facts in this case as testified to by either litigant. No witness testifies that the plaintiff was armed with a weapon, nor does the defendant say that the plaintiff attempted to kill him. On the other hand, while the instruction is predicated upon a hypothesis finding no support in the record, it assumes to instruct the jury that, before the defendant may be heard to justify on the ground of self-defense, he must have retreated to the wall, unless by so doing his danger would have been increased. Now, it is plain from the evidence that the defendant would

have been in no greater jeopardy had he retreated, and it is also undisputed that he did not retreat, so that the defendant's defense was by this instruction practically withdrawn from the jury. Authorities are cited by counsel for the respective parties to sustain or to defeat this instruction, but these cases are based upon facts so different, even in their general features, from those in the case at bar that they lend but slight assistance in determining the rule applicable to the instant case. Bearing in mind that the one party had no advantage over the other because of the location where the difficulty occurred, that the plaintiff was not armed with any weapon, and that the defendant does not contend that he believed the plaintiff was thus armed, we should put aside those cases where the plea of self-defense was interposed to a complaint for injuries inflicted in repelling an armed antagonist. This court is not committed to the doctrine that a person unlawfully assaulted must fly to the wall before he may lawfully strike a blow in self-defense, but, on the contrary, we have said as a general proposition that a person unlawfully assaulted may stand his ground and repel force by the exercise of such force as to him reasonably seems necessary to protect his person or property from injury. *Fosbinder v. Svitek*, 16 Neb. 499; *Morris v. Miller*, 83 Neb. 218. While the general proposition is sound, it cannot be successfully invoked to justify the use of force or weapons out of all proportion to the necessities of the case. A meat cleaver in the hands of an adult is a dangerous weapon, and its use to repel an ordinary assault should not be disproportionate to that assault. *Close v. Cooper*, 34 Ohio St. 98; *Foss v. Smith*, 76 Vt. 113; *McQuiggan v. Ladd*, 79 Vt. 90, 14 L. R. A. n. s. 689.

Of course, if the cleaver were raised instinctively by the defendant so that the plaintiff's arm came in contact therewith while he was attempting to strike the defendant, the defendant would not be liable. The plaintiff argues that, because the defendant so testified, the instruction criticised, if erroneous, could not have prejudiced him. We

State v. Love.

are of opinion, however, that the defendant could not lawfully use the cleaver, whether by striking the plaintiff or by placing it in position where the plaintiff would collide therewith, without some justification; that his justification in this case is the defense of his person from an unlawful assault, and that, since his requests to charge presented that thought, he was entitled to have the subject fairly presented to the jury in the court's instructions. We do not express any opinion as to the *bona fides* of that defense, but there is sufficient substance in the evidence to entitle the defendant to have his theory of the case submitted to the jury. It was therefore not only error to give the instruction quoted, but also error not to instruct according to the defendant's theory, presented by the pleadings, the proof, and the requests to charge. *Hancock & Walters v. Stout*, 28 Neb. 301; *Hartwig v. Gordon*, 37 Neb. 657; *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334; *Hauber v. Leibold*, 76 Neb. 706.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., not sitting.

STATE, EX REL. JOHN HABERLAN, APPELLANT, V. DON L. LOVE, MAYOR, ET AL., APPELLEES.

FILED APRIL 24, 1911. No. 16,762.

1. **Municipal Corporations: POWER OF LEGISLATURE: PENSIONS TO FIREMEN.** It is competent for the legislature to require cities of the metropolitan class and cities of the first class to pension superannuated firemen and to pay those pensions from the funds of the fire department.
2. **Constitutional Law: TAXATION: PENSIONS TO FIREMEN.** Such legislation is not obnoxious to the declaration in section 7, art. IX of the constitution, that "the legislature shall not impose taxes

State v. Love.

upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

3. ———: LOAN OF STATE'S CREDIT: PENSIONS TO FIREMEN. Nor is the legislation repugnant to section 3, art. XII of the constitution, which provides that "the credit of the state shall never be given or loaned in aid of any individual, association, or corporation."
4. ———: EXTRA COMPENSATION TO OFFICERS: PENSIONS TO FIREMEN. Nor does such legislation contravene section 16, art. III of the constitution, which provides that "the legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into."
5. Municipal Corporations: PENSIONS TO FIREMEN. A fireman, who in 1904, after more than 21 years' service in the fire department of the city of Lincoln, elected to retire therefrom and to receive the pension provided for by chapter 39, laws 1895, is entitled to that pension.
6. ———: ———. A fireman entitled to a service pension, no part of which is paid for injuries inflicted while in that vocation and as a result thereof, may only receive the pension provided by law at the time of his retirement.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

W. O. Frampton, Price & Abbott and Lysle I. Abbott,
for appellant.

C. C. Flansburg and Leonard Flansburg, contra.

ROOT, J.

This is a mandamus proceeding to compel the officers of the city of Lincoln "to place plaintiff upon the retired list of firemen in said city and pay him a pension of \$50 a month, and that said pension be dated from April 1, 1904." No alternative writ was issued, but the respondents filed a general demurrer, which was sustained by the district court, and the relator's application was dismissed. The relator appeals.

In 1895, the legislature, by chapter 39, laws 1895, provided: "That all metropolitan cities and cities of the first

class having a paid fire department, shall pension all firemen of the paid fire department whenever such firemen shall have first served in such fire department for the period of twenty-one years, and shall elect to retire from active service and go upon the retired list. Such pension shall be paid by the city in the same manner as firemen upon the active list are paid, and such pension shall be twenty-five per cent. of the amount of salary such retiring fireman shall be receiving at the time that he goes upon such pension list." The act also directs that pensions shall be paid to firemen permanently disabled while in the line of duty, and that pensions shall be paid to the widows and the orphans of firemen whose death shall have been caused by injuries received while in the line of duty. By the amendment of 1909 the pension is increased to 50 per cent. of the fireman's salary at the time "he goes upon such pension list," provided the pension shall be at least \$50 a month. Comp. St. 1909, ch. 30, sec. 11 *et seq.* The respondents' counsel contend that the statute is void because repugnant to section 7, art. IX, section 16, art. III, and section 3, art. XII, of the constitution.

Among other things, section 7, art. IX of the constitution, declares: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." *State v. Wheeler*, 33 Neb. 563, is cited to sustain the proposition that a tax for the support of a fire department is levied for a corporate purpose, and from this statement and declarations subsequently made in *German-American Fire Ins. Co. v. Minden*, 51 Neb. 870, *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518, *State v. Moores*, 55 Neb. 480, and *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, the conclusion is reached that a city in maintaining a fire department exercises private and corporate rather than governmental power. The opinion in *State v. Wheeler*, *supra*, did turn upon the thought that the tax sought to be exacted from foreign insurance companies for the bene-

fit of the fire department in metropolitan cities was a tax for corporate purposes, but the subject was not discussed in the briefs upon the theory that a municipality may exercise governmental duties distinct from private or corporate functions, or that any distinction should be made between them, but rather it was assumed that, if the exaction should be classified as a tax, it was laid for a corporate purpose, and so the court following the arguments of counsel, said that the money demanded was a tax laid for corporate purposes.

In *German-American Fire Ins. Co. v. Minden*, *supra*, the decision rests solely upon the principle that the ordinance considered was void because no procedure for the collection of the tax, other than by a criminal prosecution, was provided.

In *Aachen & Munich Fire Ins. Co. v. City of Omaha*, *supra*, at page 530, in the commissioners' opinion, which the court adopted, it is said: "It is admitted by the demurrer that the assessment complained of was made by the tax commissioner of the city of Omaha for municipal purposes only." Upon this hypothesis the opinion was rendered.

On the other hand, in *Gillespie v. City of Lincoln*, 35 Neb. 34, in an exhaustive and well-reasoned opinion by Judge Post, this court held that firemen should be placed in the same classification as policemen and health officers; that they are public or state officers vested with such powers as the statute confers, and that the duties they perform do not relate to the corporate functions of the municipality. This opinion is sustained by the overwhelming weight of authority. 2 Abbott, *Municipal Corporations*, sec. 700; *Cunningham v. City of Seattle*, 40 Wash. 59, 4 L. R. A. n. s. 629, and note; *Brown v. District of Columbia*, 29 D. C. App. 273; *Phœnix Assurance Co. v. Fire Department*, 117 Ala. 631, 42 L. R. A. 468; *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. *511.

Gillespie v. City of Lincoln, *supra*, has not been criticised or in any manner discredited by this court, and must

be held to state the correct general principle of law. In sustaining the right of the legislature to authorize the governor to select commissioners who shall appoint and control members of the police force and of the fire department in metropolitan cities, the functions of firemen are recognized as governmental rather than proprietary. *Redell v. Moores*, 63 Neb. 219. So, therefore, while the city of Lincoln has the right, and in its charter is given specific authority, to assemble appliances for the extinguishment of fires, to employ firemen, and to levy and collect taxes to pay the expense of the fire department, and while that purpose is a public one, it is not a corporate purpose within the prohibition in section 7, art. IX of the constitution.

We do not understand that by enforcing the provisions of the statute the credit of the state is given or loaned in aid of any individual or corporation. Section 3, art. XII of the constitution, was intended to prevent the state from extending its credit to private enterprises. *Oxnard Beet Sugar Co. v. State*, 73 Neb. 66.

Section 16, art. III of the constitution, provides: "The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into." The respondents insist that the statute under consideration offends against this part of the fundamental law. A fireman's pension may be classified as part of his compensation for services rendered, or it may be said that it is paid to him for the purpose of stimulating all those engaged in a like public duty to prevent and suppress the destruction of property and the loss of human life incident to those conflagrations which the utmost vigilance may minimize, but cannot entirely prevent in populous cities. Within whichever class the pension may fall, public funds may be appropriated in conformity with legislative authority to pay the fireman, and the money is thereby expended for a public purpose. Gray, *Limitations of Taxing Power and Public Indebtedness*, sec. 336; *Trustees of Ex-*

State v. Lova.

empt Firemen's Benevolent Fund v. Roome, 93 N. Y. 318; *Phoenix Assurance Co. v. Fire Department*, *supra*; *Firemen's Benevolent Ass'n v. Lounsbury*, *supra*. And a pension granted to a fireman, who has served since the law became effective, cannot be said in reason to be a gratuity nor the grant of extra compensation. *Commonwealth v. Walton*, 182 Pa. St. 373; *Commonwealth v. Barker*, 21 Pa. St. 610. The statute, therefore, does not contravene section 16, art. III of the constitution.

Finally, the respondents contend that, inasmuch as the relator did not serve as a fireman for 21 years subsequent to the enactment of chapter 39, *supra*, he is not entitled to a pension, and cite *State v. Ziegenhein*, 144 Mo. 283. In that case the statute construed provided: "That any person who shall serve as a policeman * * * for twenty years," etc., whereas, our statute directs that cities of certain class shall pension "all firemen of the paid department whenever such firemen *shall have* first served in such fire department for the period of twenty-one years," etc. A comparison of the statutes demonstrates the inapplicability of the *Ziegenhein* case to the case at bar, and should convince the reader that the Nebraska legislature intended the statute to apply to all firemen who have served for the period of 21 years. Of course, the fireman must have been in the service and must have retired while the law was in force, because he must have elected to retire from the service before he could be placed upon the retired list, and he could not thus elect if he were not in the service. This brings us to an important feature of the case, and that is the relator prays for a writ to compel the respondents to enroll him as a retired fireman and to place his name upon the pension list. To this extent we are satisfied that the demurrer was improperly sustained.

The relator also asks that the respondents be compelled to pay him arrears of pension at the rate of \$50 a month. Chapter 39, laws 1895, only authorized the payment of pension to the extent of 25 per cent. of the fireman's sal

ary at the time he retires from the service. The relator was being paid \$80 a month at the time he retired in 1904, so that at that time he was entitled to a pension of but \$20 a month. The enactment of 1909 increases the percentage to 50 per cent., but provides that at least \$50 a month shall be paid. If the city of Lincoln had discharged its liability to the relator, he would have received no more than \$20 a month prior to July 1, 1909. Clearly the city should not be penalized by increasing that obligation 150 per cent. So that by no fair construction of the statute should he be paid \$50 a month from the date he ceased to serve as a fireman until the amendment of 1909. Whether coincident with the taking effect of that statute he became entitled to \$50 a month is an important and interesting question.

In considering the right of the state to grant pensions, we enter an unexplored field from a local standpoint. In the constitution of 1866, the constitution adopted by the convention in 1871, but not ratified by the people, and in the constitution of 1875, the right of the state to loan its credit to individuals or to grant extra compensation to any officer of or contractor with the state is definitely and positively forbidden. At no time has the policy of the state encouraged the creation of an office-holding class. Rotation in office within the dominant party and rotation in office by the change in party control of state, county, city and village government has been a recognized feature of our civic life. It was not until 1871 that the congress of the United States seriously considered the subject of reform in the civil service and the creation of a force of permanent employees in government service, and agitation for the payment of pensions to civil officers is a subject of more recent development. The constitutional prohibitions just referred to were not formulated and adopted with a view to the eradication of evil practices then prevalent in the commonwealth. The state has generally, to say the least, been frugal in fixing official salaries, and it may have been anticipated that attempts might be made

by appropriations or *ex post facto* laws to favor individuals or to create charges upon the public treasury for services that others would have been willing to render for the compensation provided by law.

In applying these limitations to the instant case, it may be conceded that the pension forms an inducement to the individual to enter and remain in the service of the fire department, and that the pension in a sense is part of the compensation paid for those services. 2 Goodnow, Comparative Administrative Law, p. 74; Gray, Limitations of Taxing Power and Public Indebtedness, sec. 336. In this aspect of the case, if no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. *Mead v. Inhabitants of Acton*, 139 Mass. 341. But the relator continued in the service nine years after the law was enacted, and thereby earned a right to his pension under that act so long as it shall remain in force. The amendment of 1909 does not repeal the act of 1895 so as to deprive the relator of his right to a pension; but, since he rendered the state no services subsequent to the enactment of that amendment to increase his pension would violate section 16, art. III of the constitution.

The fact that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time, does not make the legislation void. The constitutional limitations do not apply to such conditions. The legislature is not restrained from paying unequal compensation for official services so long as its laws with regard thereto are general. Legislation must be couched in general terms, and in its application exact equality cannot always be obtained among individuals. These limitations do not restrain the legislature from appropriating money for the benefit of firemen disabled in the service while in the discharge of their duty, or for the benefit of the widow and the children of a fireman fatally

State v. Love.

injured while in that service and in the line of duty. It is a matter of common knowledge that the legislature appropriates money for the benefit of citizens injured while assisting in the capture of criminals, and its right to do so does not rest upon the principle that thereby compensation is paid for the time devoted to the public service, nor is the appropriation a gratuity, but it is justified upon the broad ground that the state owes the citizen a moral duty to pay him for injuries received while discharging a duty imposed by the necessities of the state upon all citizens, but which he has performed for them. The duty to extinguish conflagrations is also a public one, and the state is under the same moral obligation to its injured firemen that it owes to the citizen who is injured while assisting in the capture of a criminal. The legislature may transform that duty into a legal obligation, and impose it upon the municipalities by statutes general in their application to the class of cities affected thereby, and, so long as the law is not repealed, that obligation will be enforced by the courts.

It therefore seems to us that the writ should not issue in the form prayed for, and ordinarily we would not hesitate to affirm the judgment of the district court. It may be the trial court was moved by some such considerations to deny the writ, but the arguments of counsel do not so advise us, and, in view of the importance of this case to the pensioners upon the rolls of the Omaha department who have appeared here by counsel, as well as to the relator, we hold that the judgment of the district court should be reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., and LETTON, J., not sitting.

**W. B. ZENTMIRE, APPELLANT, V. EDWIN F. BRAILLEY,
SHERIFF, ET AL., APPELLEES.**

FILED APRIL 24, 1911. No. 16,391.

1. **Attorney's Lien: ATTACHED PROPERTY.** An attorney's lien in due form, when filed in a pending action, binds realty previously attached therein to satisfy the client's claim.
2. ———: ———: **FRAUDULENT DISMISSAL OF ACTION.** A plaintiff, by dismissing his action in fraud of his attorney's rights, cannot thereby prevent the enforcement of the attorney's lien on property attached to satisfy plaintiff's claim.
3. ———: ———: ———: **SERVICE OF NOTICE TO VACATE DISMISSAL.** A nonresident defendant whose realty has been legally attached to satisfy plaintiff's claim is chargeable with notice of the lien of plaintiff's attorney, when duly filed in the case, and notice to vacate a dismissal procured in fraud of the attorney's rights may be served on counsel who appeared for defendant.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. Affirmed.

Lambert & Winters, for appellant.

Gurley & Woodrough and D. O. Dwyer, contra.

ROSE, J.

The relief sought by plaintiff is an injunction to prevent the enforcement of an attorney's lien on real estate attached in a former action. D. O. Dwyer, an attorney at law, was employed by Frank Stanley to collect from John B. Dodson \$1,760 as stipulated commission for the sale of land. Under his employment Dwyer, to collect the sum stated, began an action in favor of his client and against Dodson in the district court for Douglas county, August 12, 1908, and immediately attached a lot in South Omaha as the property of the debtor. An attorney's lien for \$500 was filed in the case by Dwyer October 12, 1908. After a conference between Stanley and Dodson, the former dis-

Zentmire v. Brailey.

missed his action and discharged the attachment October 27, 1908, without paying Dwyer for his services and without his knowledge or consent. This occurred when Dwyer was taking depositions at Tecumseh on behalf of his client. The court entered an order of dismissal, but did not at the time know of the existence of the attorney's lien. The same day a deed conveying the attached lot to W. P. Zentmire, Dodson's father-in-law, was filed in the office of the register of deeds. A few days later, during the term at which the case was dismissed, Dwyer intervened, procured an order vacating the dismissal and reinstating the attachment to the extent of his lien, and obtained a decree for the full amount of his fees and for the foreclosure of his lien against the attached property. Though notice of the proceedings on Dwyer's behalf was in due time served on the attorneys who had entered their appearance for Dodson, he neither appeared in person nor by counsel after the action had been dismissed. To prevent the sale of the attached property to satisfy the attorney's lien, Zentmire brought this suit in equity against Dwyer and the sheriff of Douglas county. The injunction was denied, and plaintiff appealed.

In arguing the errors assigned, plaintiff asserts: The dismissal of the action terminated the litigation between the parties thereto. There was no fraud in the proceedings. Neither party could ask for a reinstatement of the case or appeal from the judgment of dismissal. The services of Lambert & Winters as attorneys for Dodson ended when the case was dismissed. Subsequent service on them was not notice to their client, and gave the court no jurisdiction to vacate the dismissal or to reinstate the attachment. Dodson did not appear in the action at law after the case was dismissed. The attorney's lien did not bind the attached property. Zentmire was an innocent purchaser, having bought the realty after the attachment was dissolved and before it was reinstated. His rights under his purchase were not affected by the subsequent reinstatement. Plaintiff concludes, therefore, that the trial

court was without jurisdiction to vacate the dismissal or to reinstate the attachment or to subject the attached property to the payment of the attorney's lien. For the reasons urged, it is insisted by plaintiff that he should be protected by injunction from the void decree. In a number of material respects these views of the law cannot be adopted.

1. Did the attorney's lien, when filed, bind the attached property? A text-writer says: "When an attachment has been made, the lien of the attachment inures to the benefit of the attorney for his fees and costs, and this cannot be defeated by any settlement made by the client with the debtor, without his consent." 1 Jones, Liens (2d ed.) sec. 232. In asserting his lien, Dwyer invoked a right granted by statute in the following language: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." Comp. St. 1909, ch. 7, sec 8. This provision is declaratory of the common law, and gives an attorney a charging or specific lien upon money in the hands of the adverse party to an action. *Cones v. Brooks*, 60 Neb. 698. The lien may attach to a judgment in favor of a client who is an executor, though the services were rendered on behalf of testator's estate. *Burleigh v. Palmer*, 74 Neb. 122. A judgment in favor of prosecutrix in a bastardy proceeding may be subjected to the lien of her attorney for professional services therein. *Taylor v. Stull*, 79 Neb. 295. The reasons for subjecting such judgments to attorneys' liens apply to attachments. Dwyer, by skill and industry in asserting the rights of his client, placed the attached property in the custody of the law to satisfy a debt of the owner. While the attachment was not a judgment, it was nevertheless a lien obtained through a process of the court. If it was effective for the purpose of collect-

ing the client's claim when the cause was dismissed, it served the purpose of a judgment. On this point the ruling is that the attached realty was charged with the attorney's lien as soon as it was filed. *Gist, Ex'r, v. Hanly*, 33 Ark. 233; *Pleasants, Adm'r, v. Kortrecht*, 5 Heisk. (Tenn.) 694; *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 503.

2. Did the dismissal deprive the attorney of his right to enforce his lien on the attached property? The lien created in favor of the attorney a right independent of the wish or control of any of the suitors. The law is that the statutory lien of an attorney is paramount to any rights of the parties to the action. *Rice & Gorum v. Day*, 33 Neb. 204. It cannot be defeated by the stipulation of the litigants or by a dismissal without the attorney's consent. *Aspinwall v. Sabin*, 22 Neb. 73. Stanley, therefore, by dismissing the action when his attorney was absent and by failing to call to the attention of the court the existence of the lien of the attorney, did not deprive him of his right to the benefits thereof.

3. Did the court have jurisdiction to vacate the dismissal and to reinstate the attachment to the extent of the attorney's lien? In granting such relief the court, during the term at which the attachment was discharged, acted promptly on proper pleadings filed by the lienor. Jurisdiction, therefore, was not lost by delay. For the purpose of this inquiry, it is immaterial whether the client's conduct was prompted by a purpose to assert a legal right or to cheat his attorney out of compensation for services. In either view, he interfered with an independent, statutory right of his attorney and wrongfully discharged property from a lien over which he had no control. He also procured an order discharging the attachment without informing the court of the existence of the lien. Otherwise, the rights of the attorney would have been protected by the court. Courts properly intervene to protect attorneys from fraudulent settlements or dismissals which would prevent the collection of just compensation for professional services. *Potter v. Ajax Mining Co.*, 19 Utah,

Zentmire v. Brailley.

421. When Dodson procured a dismissal during the existence of the attorney's lien, he acted at his peril. He was bound to know that Stanley had no authority to release the attached property from the attorney's lien. In requiring attorneys to answer to their clients, the courts fix a high standard of professional accountability, and, in dealing with the conduct of clients toward their attorneys, fraud and imposition should not be tolerated. The supreme court of Tennessee wisely observed: "While it is the duty of the courts to protect clients against all unfair advantages on the part of their counsel, it is a duty of equal obligation to shield the attorney, so far as practicable, against the bad faith and ingratitude of clients." *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 503. In the present case the conduct of the client was, in contemplation of law, a fraud upon his attorney. *Pleasants, Adm'r, v. Kortrecht*, 5 Heisk. (Tenn.) 694. The court had not lost control over its own order of dismissal when the attachment was reinstated. Under the circumstances of this case, the notice to the counsel who appeared for Dodson was sufficient. *Merriam v. Gordon*, 17 Neb. 325.

4. Was plaintiff an innocent purchaser of the attached property, having purchased it, as he asserts, after the action was dismissed and before the court reinstated the attachment? The legal effect of the attachment was to bring Dodson into court and to charge the property with a lien in favor of Stanley for the satisfaction of his claim. The attorney's lien was filed in the case and bound the property itself. "This claim," said Judge Maxwell, "may be filed with the papers in the case, and the adverse party will be chargeable with notice of its existence." *Elliott v. Atkins*, 26 Neb. 403. When plaintiff made the purchase on which he relies, there was in the files of the case an unsatisfied attorney's lien which Stanley had no authority to release. The very day of the dismissal, and during the term at which it was rendered and while the court had control over its judgment for the purpose of changing or correcting it, plaintiff bought the attached

Witt v. Old Line Bankers Life Ins. Co.

property from his son-in-law, Dodson. An examination of the entire record, when all the circumstances connected with the transfer are considered, leads to the conclusion that the trial court properly found that plaintiff was not an innocent purchaser.

There is no error in the order denying the injunction, and the judgment is

AFFIRMED.

JOHN WITT, APPELLEE, V. OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLANT.

FILED APRIL 24, 1911. No. 16,395.

1. **Contracts: PLEADING.** In stating a cause of action on a contract, plaintiff must at least allege facts showing that it was executed by, or is the obligation of, defendant, where it is set out in the petition and purports on its face to be the personal obligation of another, and not of defendant.
2. ———: ———: **PERFORMANCE OF CONDITIONS.** In a suit on a conditional contract for the payment of money, plaintiff must either comply with section 128 of the code by alleging generally that he "duly performed all the conditions on his part," or specifically allege facts showing that he performed all the stipulated conditions precedent to his right to a recovery.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

E. F. Pettis, for appellant.

Courtright & Sidner, contra.

ROSE, J.

This is a suit to recover back an advance premium of \$237.85 paid by plaintiff to defendant on a subsequently rejected application for life insurance. A demurrer to the petition was overruled. Defendant refused to plead fur-

ther. A judgment in favor of plaintiff for the full amount of his claim followed. Defendant has appealed.

The correctness of the ruling on the demurrer is the question submitted. In the petition it is alleged: Defendant is a corporation organized and doing business under the laws of Nebraska as a life insurance company. August 10, 1905, plaintiff applied to defendant in writing for insurance on his life in the sum of \$5,000, and delivered the application to defendant. Defendant has the original application, and plaintiff has no copy. At the same time plaintiff paid defendant \$237.85 as an advance premium in the event of the approval of his application and the issuance of a policy, and received from defendant a contract in writing, as follows: "No. 42817. Conditional Receipt. Amount \$237.85. Received at Scribner, State of Neb., this 10 day of Aug., 1905, of John Witt, the sum of \$237.85, in payment of premium upon \$5,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company of Lincoln, Nebraska. Policy to date at issue, providing said application is approved by said company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein. It is understood and agreed that all the premiums are due in advance and payable in cash, therefore, when notes are taken by the agent as an accommodation to the party insured, any refusal afterwards to accept the policy, or any tender of said policy back to the company or to an agent, will not in anywise release the party insured from liability on said notes, as the same must be promptly paid, whether the party desires to continue insurance or otherwise. John Witt, Applicant. C. K. Huntington, Agent."

The petition further alleges: Huntington was the agent of defendant, and was duly qualified to make the contract. The contract was executed in duplicate and a copy delivered to each of the parties. Defendant declined to

approve plaintiff's application, and ever since has refused to issue a life insurance policy to plaintiff. No part of the advance premium paid to defendant has ever been returned to plaintiff. The amount due plaintiff is also pleaded, and there is a prayer for judgment therefor. The paragraph alleging performance of the contract on the part of plaintiff is as follows: "At said time the defendant named to the plaintiff O. C. Hopper as a physician to whom the plaintiff should submit himself for a medical examination, and thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing, and delivered the same to the defendant."

1. The sufficiency of the petition is challenged on the ground it is nowhere stated therein that the receipt pleaded was executed by defendant. Defendant is not a party to the receipt. The place for the signature is filled as follows: "C. K. Huntington, Agent." The word "agent" is merely descriptive of the person. *Morgan v. Bergen*, 3 Neb. 209. The receipt containing the conditional promise to return the advance premium, therefore, purports on its face to be the contract of "C. K. Huntington," and not the contract of the "Old Line Bankers Life Insurance Company," defendant. Following earlier cases, this court in *Fowler v. McKay*, 88 Neb. 387, ruled: "Parties contracting in their own names do not exclude their personal responsibility by describing themselves as agents of another, and such a contract is their obligation, and not that of their principal. *Persons v. McDonald*, 60 Neb. 452; *Morgan v. Bergen*, 3 Neb. 209." Having sued the Old Line Bankers Life Insurance Company on a contract purporting on its face to be the personal obligation of another, it was incumbent on plaintiff, at least, to allege in some form facts showing that defendant executed it or that it is the obligation of defendant. Allegations pleading these essential facts cannot be found in the petition, and they should not be inferred from equivocal or doubtful language, since the petition is being tested by demurrer

and must be construed most strongly against the pleader. *Gibson v. Parlin & Orindorff*, 13 Neb. 292. Failing to show by proper allegations that defendant entered into and is bound by the contract on which the suit is based, the petition is fatally defective; and the demurrer should have been sustained.

2. An argument more vehemently presented, however, is directed to the proposition that plaintiff did not sufficiently allege performance on his part as a condition of his right to recover back the advance premium paid. The promise to return the money was conditional. Plaintiff was therefore required, in stating a cause of action, to allege that he performed all of the conditions precedent to his right to a recovery. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76; *Husenetter v. Gullikson*, 55 Neb. 32; *Burwell & Ord Irrigation & Power Co. v. Wilson*, 57 Neb. 396. In this respect an allegation that plaintiff duly performed all of such conditions on his part would have been sufficient under the code, which declares: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Code, sec. 128. Plaintiff, however, did not see fit to avail himself of this liberal statutory provision. Neither did he comply with the common law rule that the pleader must show specifically the time, place and manner of performance. Bliss, Code Pleading (2d ed.) sec. 301. The stipulations relating to the return of the premium and requiring plaintiff to submit to the examination are: "Policy to date at issue, providing said application is approved by said company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein." The examination contemplated by the contract was, of course, the requisite medical examination required by all reputable life insurance companies before assuming a risk. On the face of the contract

the assurer was not limited to a single examination by the physician first designated, like the one pleaded. The report of the examiner may have omitted some fact vital to the assuming of the hazard. Symptoms requiring an examination by a specialist may have been reported to defendant as a result of the examination pleaded. Plaintiff's right to the policy for which he stipulated depended upon an examination commensurate with the risk to be assumed. In the very nature of the policy for which the advance premium was paid, a single examination, if incomplete or unsatisfactory, could never have been within the contemplation of the parties. Safe underwriting forbids such a construction of the contract. For anything appearing in the allegations relating to performance on the part of plaintiff, his own capricious refusal to submit to further examination may be the sole cause of defendant's failure to issue the policy.

When the entire pleading is considered in connection with the contract, the allegation that "thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing" amounts to no more than a conclusion of law, which must be disregarded in testing the petition. *Kruse v. Johnson*, 87 Neb. 694. Such a conclusion is not admitted by the demurrer. *Markey v. School District*, 58 Neb. 479. Not having alleged performance in the general language authorized by statute, plaintiff was required to state specifically the facts showing that he complied with the conditions of his contract. On this subject the supreme court of Indiana said: "If a party does not make the general allegation authorized by the statute, but undertakes to make a specific allegation of performance, he must make it with the particularity and strictness required by the rules of the common law." *Home Ins. Co. v. Duke*, 43 Ind. 418.

Under any proper rule of pleading, performance on the part of plaintiff is not sufficiently alleged. On this ground also the demurrer should have been sustained. The judg-

ment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., dissenting.

The majority opinion, in my judgment, is so clearly wrong that I cannot permit it to go down without expressing my dissent.

The petition alleges:

"(1.) The defendant is a corporation organized and doing business under the laws of Nebraska as a life insurance company.

"(2.) On or about August 10, 1905, the plaintiff made application to the defendant in writing, for a life insurance policy on the life of the plaintiff, to be written by the defendant in the sum of \$5,000, and delivered said written application to the defendant, and defendant has the same and plaintiff has no copy thereof.

"(3.) At the same time the plaintiff paid to the defendant \$237.85 as advance premium on said policy in case said application was approved and policy issued, and received from the defendant a contract in writing in words and figures as follows: 'No. 42817. Conditional Receipt. Amount \$237.85. Received at Scribner, State of Neb., this 10 day of Aug., 1905, of John Witt, the sum of \$237.85, in payment of premium upon \$5,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company of Lincoln, Nebraska. Policy to date at issue, providing said application is approved by said Company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein. It is understood and agreed that all the premiums are due in advance and payable in cash; therefore, when notes are taken by the agent as an accommodation to the party insured, any refusal afterwards to accept the policy, or any tender of said policy back to the company or to an agent, will not in anywise release the

party insured from liability on said notes, as the same must be promptly paid, whether the party desires to continue insurance or otherwise. John Witt, Applicant. C. K. Huntington, Agent.'

"(4.) At said time said C. K. Huntington, who signed said contract, was the agent of the defendant, and duly qualified to make said contract.

"(5.) Said contract was executed in duplicate and duly delivered to each of the parties hereto, the plaintiff taking one copy and the defendant taking one copy.

"(6.) At said time defendant named to the plaintiff O. C. Hopper as a physician to whom the plaintiff should submit himself for a medical examination, and thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing, and delivered the same to the defendant.

"(7.) During all of the times above mentioned, the plaintiff has been, and now is, a resident of Dodge county, Nebraska, and each and all of the transactions above mentioned happened and occurred in Dodge county, Nebraska, and said payment was made and contract entered into in Dodge county, Nebraska, and said policy of insurance was to have been delivered to plaintiff in Dodge county, Nebraska, and in lieu thereof said repayment of the premium advanced was payable to the plaintiff in Dodge county, Nebraska.

"(8.) The defendant declined to approve plaintiff's said application, and has ever since said time refused, and does now refuse, to issue a life insurance policy to plaintiff."

In his brief, counsel for defendant says that his main contention is "that there is no allegation in the amended petition, either in accord with common law rules or section 128 of the code, to the effect that appellee had duly performed all the conditions on his part to be done or performed or complied with." That section was never intended to be the exclusive method of pleading a compliance with all the essential requirements of a contract. Let

us analyze this petition and see what it in fact alleges. It alleges that plaintiff made a written application to defendant for a policy upon his life, and at the time of making the application paid to defendant as an advance premium \$237.85, at the same time receiving from defendant the contract in writing, denominated a "conditional receipt," set out in the third paragraph. This receipt recites that this sum of money was received in payment of premium upon a policy which he had that day applied for: "Policy to date at issue, providing said application is approved by said company; otherwise said payment is to be returned to said applicant." We think it is clear that the payment of this advance premium, to be applied upon the policy if issued, and to be returned providing the plaintiff's application should not be approved, constitutes the contract which was then and there entered into between the parties. What follows in the conditional receipt is in effect a collateral agreement for a forfeiture, viz., a forfeiture of the payment he had made in the event that he refused, "after being written," that is, after his application had been written out, "to submit to a medical examination," or afterwards refused to accept a policy issued upon such application. The allegations that plaintiff submitted to an examination which defendant, declined to approve and that defendant had at all times refused to issue a policy to plaintiff negative the forfeiture; and, if defendant desired to avail itself of such forfeiture, it should have done so by affirmative allegations in an answer.

The conditional receipt was signed "John Witt, Applicant. O. K. Huntington, Agent." If the petition stopped there, it might be urged that this paper was not the contract of defendant, but was simply the personal contract of Mr. Huntington; but that contention must give way to the next two paragraphs of the petition which allege that Huntington, who signed the contract, "was the agent of the defendant, and duly qualified to make said contract," and that "said contract was executed in duplicate and

duly delivered to each of the parties hereto, the plaintiff taking one copy and the defendant taking one copy." Not that plaintiff took one copy and Huntington the other, but that plaintiff and defendant each took a copy. While the word "agent" after the signature of Mr. Huntington to the conditional receipt might, under certain circumstances, be considered *descriptio personæ*, it cannot be so taken in the light of the allegations immediately following his signature, as above set out. It does violence to every rule of code pleading and ignores the plain meaning of unambiguous language to hold that the allegations of the petition above referred to, taken in connection with the contract, do not allege that the contract was the contract of defendant, and not that of Huntington.

As showing that defendant had complied with the terms of the contract by submitting to a medical examination, the sixth paragraph of the petition expressly alleges that "at said time defendant named to the plaintiff O. C. Hopper as a physician to whom the plaintiff should submit himself for a medical examination and thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing, and delivered the same to the defendant." Again we assert, it would be doing violence to every rule of code pleading to say that this allegation does not clearly mean that plaintiff submitted himself for a medical examination to the physician designated by defendant, and that such physician made a medical examination of plaintiff and delivered the same in writing to defendant. Plaintiff's agreement was that he would submit to a medical examination by a physician and take the policy which should thereafter be delivered by defendant. He did not agree to submit to a series of examinations. His agreement was "to submit to a medical examination." If defendant did not see fit to issue a policy upon that examination, plaintiff was absolved from any further duty, and was thereafter entitled to a return of his money. Notwithstanding plain-

tiff had done all that was required of him, the petition alleges "defendant declined to approve said application, and has ever since said time refused, and does now refuse, to issue a life insurance policy to plaintiff." We think the petition fairly and substantially alleges in detail a performance by plaintiff of every condition to be performed on his part precedent to his right to demand a return of his money. This was sufficient, and it would have been superfluous to have added the general allegation permitted by section 128 of the code, the only office of which is to enable poor lawyers to secure pleadings which will withstand demurrer, by alleging a mere conclusion.

In *Pfister v. Sentinel Co.*, 108 Wis. 572, 580, the court say: "It is elementary law, as applied to code pleadings, that a complaint will not be overthrown on demurrer unless it is wholly insufficient. Every reasonable intendment is to be made in its favor"—citing *Morse v. Gilman*, 16 Wis. *504, and a number of other cases. *Morse v. Gilman* holds: "Every reasonable intendment and presumption is to be made in favor of a pleading, and a complaint will not be held bad on demurrer, however defective, uncertain or redundant may be the mode of the statement of facts, if a cause of action may be gathered from it, and it is not so defective that taking all the facts to be admitted, the court can say that they do not constitute any cause of action whatever." That case is cited with approval and the rule announced followed by this court in *Roberts v. Samson*, 50 Neb. 745.

There is another theory upon which the judgment below should be affirmed. If everything that is alleged in reference to the conditional receipt above set out were entirely eliminated from the petition, the petition would still state a cause of action against the defendant for money had and received. It was therefore invulnerable to a general demurrer.

REESE, C. J., and LETTON, J., concur in above dissent.

JAMES A. MARTIN, APPELLANT, V. ALBERT G. HARVEY,
APPELLEE.

FILED APRIL 24, 1911. No. 16,343.

1. **Trial: MOTION TO DIRECT VERDICT: EFFECT.** Where each party to a trial by jury requests the court to direct a verdict in his favor, he waives the right to thereafter insist that any question of fact should have been submitted to the jury.
2. **Ejectment: EVIDENCE UNDER GENERAL DENIAL.** Under a general denial, in an action of ejectment, the defendant may show that a deed in plaintiff's chain of title was a forgery.
3. ———: ———. The defendant, under such an answer, may prove, by any legal evidence he may have, any fact which will defeat the plaintiff's action.
4. **Evidence examined and set out in the opinion held sufficient to sustain the judgment of the trial court.**

APPEAL from the district court for Chase county: ROBERT C. ORR, JUDGE. *Affirmed.*

J. L. McPheely, for appellant.

Morlan, Ritchie & Wolff, contra.

FAWCETT, J.

This is an action of ejectment to recover the possession of the northeast quarter of section 30, township 5, range 38, in Chase county. The petition is in the usual form. The answer admits that defendant is in possession, and denies every other allegation in plaintiff's petition. After both sides had rested, plaintiff and defendant each requested the court to direct the jury to return a verdict in his favor. The court overruled plaintiff's and sustained defendant's motion, and directed the jury to return a verdict in favor of defendant, which was done. A motion for a new trial was overruled and judgment entered upon the verdict. Plaintiff appeals.

Plaintiff's fourth and fifth assignments of error are

Martin v. Harvey.

that the court erred in directing a verdict for defendant. By requesting a directed verdict, the right to insist upon the submission of any question to the jury was waived. *Dorsey v. Wellman*, 85 Neb. 262; *Phœnix Ins. Co. v. Kerr*, 129 Fed. 723, and cases there cited.

The only other assignment of error argued in plaintiff's brief is that the verdict is not sustained by the evidence. One of the links in plaintiff's chain of title is a deed from Samuel Harvey to John E. Kelley, dated September 25, 1899, for an express consideration of \$600. The original deed was not produced. After showing that it was not in the possession of plaintiff, the record of the deed was received in evidence. Defendant, who is a son of the grantor in that deed, contends that the deed was a forgery. It is insisted by plaintiff that proof of that fact cannot be made under a general denial in the answer. In the syllabus in *Staley v. Housel*, 35 Neb. 160, we held: "(1.) Under a general denial, in an action of ejectment, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. (2.) The defendant, under such an answer, may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action." This rule has been steadfastly adhered to in this court. The only proof offered by plaintiff of the execution of the deed in question, outside of the record of the deed itself, is in the testimony of Mr. Kelley, the grantee in that deed. As already stated, the deed purports to have been executed September 25, 1899. Mr. Kelley testified: "I paid either \$15 or \$25 in cash, and paid off the mortgage and taxes that were then accumulated against the land. The mortgage was held by the Sullivan's Saving Institution, originally \$400, with accrued interest and taxes, amounting to \$600, is what I paid him. Q. Where was the transaction had? A. In my office at McCook, Nebraska." After giving a short description of the man who executed the deed, he testifies: "I sold the land for \$300 to John and Francis Woods." On cross-examination he was asked: "Q. Who was that man you

Martin v. Harvey.

described a while ago, what was his name? A. Samuel Harvey. Q. When did you first meet him? A. The first time I remember of meeting him was when he executed this deed. Q. And when was the last time you saw him? A. That was the only time that I saw him. Q. Where did this man say he lived? A. At Lincoln, Nebraska. Q. Did you ever see him in Lincoln? A. I never did." The name of the notary before whom the deed purports to have been acknowledged is Lillian H. McCarl. She was not produced as a witness.

The evidence shows Mr. Kelley to have been an attorney and dealer in real estate. It is natural to suppose that such a man would promptly record a deed to property for which he had paid a substantial consideration; but the evidence shows that the deed he claims to have received was not recorded until two days after he had conveyed the land to the Woods brothers, for one-half the amount which he claims to have paid for it. No explanation is attempted to be made as to how he and Mr. Harvey happened to meet on September 25, 1899. So far as the record shows, there had never been any correspondence between them. Under the testimony of Mr. Kelley it would appear that Mr. Harvey entered his office that day, sold him his quarter section of land for from \$15 to \$25, subject to a \$400 mortgage with interest and taxes, executed a deed therefor, and departed. On the part of defendant it is shown that during the entire year of 1899 Mr. Harvey was living with a son in Lincoln; that he had undergone an operation for strangulated hernia; that he was afflicted with kidney trouble; that he was infirm to the extent of being almost helpless; that in September, 1899, he was unable to walk even an inconsiderable distance without assistance. The son, with whom he was living, and the defendant both testified that he never was away from Lincoln during that entire year; that he could not have made a trip to McCook without assistance. Their testimony is corroborated quite strongly by four other witnesses, one of whom was the grocer with whom they traded, whose

store was in the same block. This testimony affects an important link in plaintiff's chain of title, and is sufficient to sustain the judgment of the trial court. It is insisted by plaintiff that the record does not reveal whether or not the court considered this question, or, in other words, that the record does not show that it was upon the strength of this testimony that the court directed a verdict in favor of defendant. As this testimony presents the most important question in the case, and the only theory upon which the court could properly have directed a verdict for defendant for the whole of the premises in controversy, we must assume that the court found that the deed from Samuel Harvey to John E. Kelley was a forgery. This being an action at law, and this testimony being sufficient to sustain the action of the court in directing a verdict for defendant, and to support the judgment, we cannot interfere.

The judgment of the district court is therefore

AFFIRMED.

JACOB STRAUSS ET AL., APPELLEES, V. MONITOR SPECIALTY COMPANY ET AL.; M. J. RAMAEKERS, APPELLANT.

FILED APRIL 24, 1911. No. 16,396.

1. **Notes:** REFORMATION: PLEADING. Petition examined and set out in the opinion *held* sufficient to sustain a judgment reforming the promissory notes in suit.
2. ———: ———: EVIDENCE. Evidence examined and set out in the opinion *held* clearly sufficient to sustain the allegations of the petition, and the judgment.

APPEAL from the district court for Douglas county: **LEE S. ESTELLE, JUDGE.** *Affirmed.*

A. M. Post and C. N. McElfresh, for appellant.

Crane & Boucher and A. E. Henly, contra.

FAWCETT, J.

The petition alleges substantially: That the defendant the Monitor Specialty Company is a Nebraska corporation; that on February 18, 1908, said defendant was adjudged a bankrupt, and defendant Abel V. Shotwell was appointed trustee in bankruptcy of its estate; that during all of the times mentioned in the petition defendant D. G. Walker was the president and defendant M. J. Ramaekers the secretary and treasurer of the corporation; that on November 14, 1907, the defendant corporation made and executed three promissory notes, one for \$300 due on or before December 14 after date, one for \$300 due on or before December 24 after date, and the third for \$202.90 due on or before January 14 after date. These notes were all alike in form, payable to the order of "ourselves," and signed "The Monitor Specialty Co., by D. G. Walker, President, by M. J. Ramaekers, Sec'y & Treas." Each note was indorsed upon the back as follows: "D. G. Walker. M. J. Ramaekers." That after the notes were so signed and indorsed "all of said defendants for a valuable consideration delivered said notes to these plaintiffs." That at the time of the execution and delivery of the notes "it was the intention of the defendants to execute to these plaintiffs valid and enforceable promissory notes aggregating said sum of \$802.90, but that at said time said defendant the Monitor Specialty Company failed to indorse said notes, by reason of which failure to indorse said notes these plaintiffs are unable to enforce same against said defendants, and will be unable to enforce same unless this court shall require said defendant the Monitor Specialty Company to indorse same. * * * That at the time of the execution and delivery of said promissory notes, as herein set forth, it was agreed and understood that said notes should be indorsed by the defendant the Monitor Specialty Company, but that through inadvertence and mistake said defendant the Monitor Specialty Company failed and omitted to indorse said notes, and said defend-

Strauss v. Monitor Specialty Co.

ant the Monitor Specialty Company has failed and refused, and still fails and refuses, to indorse said notes, though often requested by these plaintiffs so to do, and said defendants the Monitor Specialty Company, D. G. Walker, and M. J. Ramaekers claim and contend that, by reason of the failure and omission of said the Monitor Specialty Company to indorse said notes, same are of no force or effect and create no liability against the said mentioned defendants." That when the notes became due they were duly presented to the defendant corporation for payment, but were not paid, whereupon said notes were duly protested for nonpayment, "of all of which said D. G. Walker and M. J. Ramaekers had due notice," the cost of said protest, \$9.30, being paid by plaintiffs. That plaintiffs are the owners and holders of same, and that there is now due and owing to the plaintiffs thereon the sum of \$802.90, together with interest and the further sum of \$9.30 protest.

The prayer of the petition is that the defendants the Monitor Specialty Company and D. G. Walker, as president, and M. J. Ramaekers, as secretary and treasurer, and Abel V. Shotwell, as trustee in bankruptcy, be required forthwith to indorse said notes in the name of the Monitor Specialty Company as of the date of November 14, 1907, by writing across the back of said note the name of said "The Monitor Specialty Co., by D. G. Walker, President, by M. J. Ramaekers, Secretary and Treasurer, and by Abel V. Shotwell, Trustee in Bankruptcy of the estate of said The Monitor Specialty Co.;" and that plaintiffs recover judgment against the defendants the Monitor Specialty Company, D. G. Walker, and M. J. Ramaekers for the amount of said notes and interest.

The answer admits the corporate capacity of defendant the Monitor Specialty Company; that defendant Shotwell is trustee in bankruptcy of the estate of said bankrupt; that defendant the Monitor Specialty Company is indebted to plaintiffs "in the sum of about \$800, but on open account, less certain dividends paid thereon," and denies

each and every other allegation in the petition. Further answering, defendants allege that the petition does not state facts sufficient to constitute a cause of action, and that several causes of action are improperly joined. There was a trial to the court, which resulted in a decree of reformation and judgment upon the notes as prayed in plaintiffs' petition. Defendant Ramaekers alone appeals.

At the opening of the trial defendant objected to the introduction of any evidence on the part of plaintiffs, "for the reason that the petition filed by said plaintiff does not state facts sufficient to constitute a cause of action; and for the reason that several causes of action in said petition are improperly joined." This objection was overruled, which ruling is now assigned as error. The objection that several causes of action were improperly joined is not discussed in the briefs. It will therefore be treated as abandoned and the objection to the sufficiency of the petition alone considered. The defendant contends that, in order to obtain the reformation of a written instrument, the right to such reformation must be established by evidence which is "clear, convincing, satisfactory, specific, and free from reasonable controversy; and that complainant was free from negligence," and that, if that degree of proof is required, the petition, upon which the action is based, should allege the facts with equal clearness and certainty. We think defendant has stated the rule a little more strongly than it has ever been applied in this court; yet we concede that his contention is substantially correct. Our understanding, however, of the clearness and certainty of allegation and proof necessary to sustain a suit for reformation of a written instrument is that it must be sufficient to satisfy the mind that the contract as written is not the contract intended by the parties, and that the error or deficiency therein is the result of a mutual mistake of law or fact on the part of the parties to such contract. Does this petition meet that requirement? Let us see. It alleges that at the time of the execution and delivery of the notes in controversy "it was the intention of

the defendants to execute to these plaintiffs valid and enforceable promissory notes aggregating said sum of \$802.90." It is contended by defendant that this allegation is insufficient. The petition had already alleged the giving, indorsing and delivery of the notes in suit and had set them out in full. The effect, therefore, of the allegation just quoted is that it was the intention of the defendants in executing these notes to execute valid and enforceable notes; and the allegation complained of is immediately followed by a statement of the fact which rendered them unenforceable. We are unable to concur in defendant's contention.

The petition further alleges that at the time of the execution and delivery of the notes "it was agreed and understood that said notes should be indorsed by the defendant the Monitor Specialty Company, but that through inadvertence and mistake said defendant the Monitor Specialty Company failed and omitted to indorse said notes." If it was the agreement that the notes which were made payable to "ourselves" were to be indorsed by the maker, the Monitor Specialty Company, that agreement, if carried out, would have made the notes "valid and enforceable." They were not so indorsed, the petition alleges, "through inadvertence and mistake." We think this allegation was sufficient. We therefore hold that the petition stated a cause of action.

The next point urged is that the decree and judgment of the court are against the weight of evidence, and that the court erred in overruling defendant's motion, upon plaintiffs' rest, for a dismissal of the action and in entering judgment for plaintiffs. The evidence shows that at the time the notes were drawn President Walker and Secretary Ramackers resided at Lindsay, Nebraska, which place appears to have been the home office of the defendant corporation. The company at that time maintained an office in Omaha, of which one Charles E. Charnquist was the manager. On the day the notes were written, one A. K. Cardoza, a representative of plaintiffs, called upon Mr.

Strauss v. Monitor Specialty Co.

Charnquist in his office in Omaha in relation to the settlement of the account then due from defendant corporation to plaintiffs. Mr. Cardoza died prior to the trial of this case, and plaintiffs were compelled to rely upon Mr. Charnquist for testimony as to what occurred at the time the notes were drawn. At the time of testifying, Mr. Charnquist was not in the employ of the defendant corporation. His testimony is to the effect that when Mr. Cardoza called he demanded payment of plaintiffs' account, and eventually suggested "that the company give him notes in payment of the account, consequently those notes were given." The notes were written out by Mr. Charnquist. When it came to the naming of the payee in the notes, he asked Cardoza "who he wanted the notes payable to." Cardoza answered: Make them payable to "ourselves." Mr. Charnquist says he then turned around and looked at Cardoza, and said: "Why not make the notes payable to you or the Strauss Brothers Company direct, and he began to get sort of angry, and said that his father had instructed him from early childhood to draw up all his checks and papers payable to myself or ourselves, and emphasized very strongly more than once that his father had been supreme judge for a good many years in the state of New York, and insisted that I make the notes payable to 'ourselves,' and have them signed by the president and secretary of the Monitor Specialty Company and indorsed by them individually or by D. G. Walker and M. J. Ramaekers." He further testified: "I made the remark to him that the notes would not be good to him or anybody else, notes that were made payable to ourselves and signed by them, and indorsed by M. J. Ramaekers and D. G. Walker individually, but he became very uneasy and got up and paced the floor, and insisted that they should be made that way, and insisted that I immediately write out the blanks and also write a letter and send up there, which I did. I done just as he told me to." It is now insisted that this testimony shows that the deficiency in the notes is due to the action of Car-

doza; that the notes were drawn as he demanded, and hence plaintiffs are not now entitled to have them reformed. It is argued that Mr. Charnquist had been a banker and knew that notes drawn as these were would not be good, but Mr. Charnquist further testified that nothing was said between him and Cardoza about these notes being indorsed by the Monitor Specialty Company. It is apparent therefore that the only discussion between Cardoza and Charnquist about the validity of the paper was in reference to the face of the notes. So far as the validity of the face of the notes is concerned, Cardoza was right and Charnquist, notwithstanding his prior banking experience, was wrong. The notes were properly drawn upon their face. The fact that upon their face they were made payable to "ourselves" did not render them invalid or in any manner unenforceable. The fact that, in order to complete the making of the notes, it was required that they be indorsed by the maker upon the back was not discussed by Cardoza and Charnquist, and hence what they said about the form of the notes has no bearing upon the right of plaintiffs to a reformation. When the notes were finally drawn, as insisted upon by Cardoza, they were sent by Charnquist to the home office at Lindsay for execution by the president and secretary, who alone had authority to execute them. When they received the notes, it was their duty to execute them, not merely to sign them upon the face, as that would not be a complete execution of the instruments. It was their duty not only to sign them upon their face, but to indorse them upon the back. This they failed to do, either through ignorance of the law, through inadvertence, or as a fraud upon the plaintiffs. In the absence of evidence, we will not impute fraud to these gentlemen. The law in such a case will presume that they did not intend to defraud, but intended to execute to plaintiffs valid promissory notes for an indebtedness which was then due, and in and by which notes the company would obtain an extension of that indebtedness for periods ranging from 30 to 60 days; and the law will

indulge a like presumption of honesty as to the indorsers, Walker and Ramaekers, viz., that, when they personally indorsed the notes, they intended to indorse and thought they were indorsing valid promissory notes for a valuable consideration, viz., the extension of time for the payment of the indebtedness of the company for which they were respectively president and secretary. Defendants have not seen fit to offer any explanation of the transaction in question. President Walker, it would seem, recognizes the justice of the decree of the district court, in that he has not appealed therefrom either individually or for the corporation. Mr. Charnquist further testified: "Q. State whether or not these notes which you have identified as exhibits 2, 4 and 6 were intended to take the place of the indebtedness of the Monitor Specialty Company to Strauss Brothers Company on the books of the company, and were to be considered as in settlement of that indebtedness? A. Why, as far as I know, that was the intention." The thought cannot be entertained for a moment that any of the parties intended to substitute unenforceable notes for an undisputed account.

The testimony of Thomas D. Crane is to the effect that he is one of the attorneys for plaintiffs; that on December 24, 1907, his firm received the notes in question from plaintiffs; that within two or three days thereafter he called upon Mr. Charnquist in relation to them; that he had a number of conversations with Mr. Charnquist, and that he, Charnquist, never in any of those conversations said anything about the alleged invalidity of the notes; that, when requested to make payment, he said that they were getting ready to send out statements to their customers, and that along about January 10 their remittances would be coming in, "and that these notes would be settled as soon as possible thereafter." Upon one occasion Charnquist called at the witness's office, when the matter was again discussed, and he was told by Mr. Crane that plaintiffs were urging them to bring suit unless the notes were paid, and that he also referred to

other claims his firm had in their hands which would have to be sued if not paid promptly; that Charnquist gave him two checks, one for \$100 and one for \$50, telling witness that he could apply these sums on any of the claims he wanted to; that the witness told him that he would apply them on the two claims his firm had had the longest, but that he would expect him to make the next payment on the Strauss Brothers notes, "and he said he would get around to it and do so." The witness also testified that his firm had received two small dividends upon plaintiffs' claim from the trustee in bankruptcy; that no objections whatever were made in the bankruptcy proceedings by the trustee or the Monitor Specialty Company or anybody else that these notes were incomplete and insufficient; that on November 24, 1907, he had a conversation with President D. G. Walker, at Lindsay, Nebraska; that in that conversation Dr. Walker said to him, "Yes; we will sign that note; we want to treat Robbins & Prokesch (whose claim Mr. Crane was then representing) in the same way we have treated the other creditors, and we will give our note to secure the claim of Robbins & Prokesch the same as we have Strauss Brothers and other creditors;" that the Robbins & Prokesch note was signed the next day, when, he says, "I tried to get him to have some of the other stockholders in the Monitor Specialty Company sign with him to secure the indebtedness due to our clients, Robbins & Prokesch, but he said that all of the stockholders in the Monitor Specialty Company had recently executed a note for \$5,000 which they had intended to negotiate and raise the money to pay off their indebtedness, and he mentioned the indebtedness of Robbins & Prokesch, Strauss Brothers Company, and the Enger-Kress Pocket-book Company, but he said the panic came on, and he said the very day of the panic he came to Omaha or sent down to Omaha this \$5,000 note, and that the First National Bank of Omaha had agreed to advance the money on it, but the panic coming on stopped it. He said, if it

hadn't been for the panic, Robbins & Prokesch, Strauss Brothers and Enger-Kress would all have been paid." When asked if he had ever had any conversation with Mr. Ramaekers about the notes, he answered: "When the note was signed on the morning of November 25, 1907, Dr. Walker stated to Mr. Ramaekers that this note was given to secure the merchandise indebtedness due to Robbins & Prokesch, the same as the other notes had been given."

It will thus be seen that from the time these notes were signed and delivered to plaintiffs the defendants and Charnquist all treated them as valid in all respects, and never once intimated that they entertained any thought of their invalidity. It was not until counsel for plaintiffs brought suit upon the notes in the county court that this claim was made. It would seem that defendants interposed a demurrer in that court. Mr. Crane testified that the defendants' attorney informed his partner, in the presence of the witness, the grounds of his demurrer, stating that it was because the notes were informal and made payable to the order of "ourselves" and not indorsed by the Monitor Specialty Company, that thereupon counsel dismissed the action in the county court without prejudice and commenced the present suit.

To our minds the proof meets every condition insisted upon by defendants. We think it established beyond reasonable doubt that at the time these notes were signed and delivered defendants thought they were giving, and plaintiffs thought they were receiving, valid notes for the indebtedness due from defendants to plaintiffs, and that the failure upon the part of defendant corporation to indorse the notes was the result of either inadvertence or mistake. In the face of this record, it would be a travesty upon justice to permit defendant Ramaekers to escape his just liability upon these notes, which could only be done upon the theory that he, the secretary and treasurer of defendant company, when he indorsed the notes individually and sent them to plaintiffs, knew that the notes

State Bank v. Bradstreet.

were invalid, and that he, as an officer of the company, was thereby perpetrating a fraud upon plaintiffs.

The judgment of the district court is right, and it is

AFFIRMED.

**STATE BANK OF BEAVER COUNTY, APPELLEE, V. TOM
BRADSTREET, APPELLANT.**

FILED APRIL 24, 1911. No. 16,406.

1. **Appeal: BILL OF EXCEPTIONS: CERTIFICATION.** The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by the certificate of the clerk of the trial court.
2. **Bills and Notes: ACCEPTANCE.** The telegram set out in the opinion held to be an unconditional acceptance of the draft sued upon.

**APPEAL from the district court for Hall county: JAMES
R. HANNA, JUDGE. Affirmed.**

Harrison & Prince, for appellant.

Bayard H. Paine, contra.

FAWCETT, J.

The petition alleges that one J. A. McMillan presented to plaintiff bank the following draft: "Beaver, Utah, 11-6 1906. Tom Bradstreet; Pay to the order of State Bank of Beaver County \$250, two hundred and fifty 00-100 dollars"—and requested plaintiff to cash the same, which plaintiff declined to do; that McMillan then requested the draft to be forwarded for collection; that thereafter McMillan returned to plaintiff bank, after said draft had been forwarded for collection, and again requested plaintiff to cash the same, which plaintiff refused to do unless the draft should first be accepted by the defendant upon whom it was drawn; that at the request of

State Bank v. Bradstreet.

McMillan plaintiff sent a telegram to defendant, asking him if he would pay the draft, and received from defendant the following: "November 7, 1906. To Beaver County State Bank, Milford, Ut. Will pay McMillan's draft on me two fifty for horses. T. Bradstreet"; that plaintiff, relying upon this acceptance, paid McMillan the full sum of \$250 and became the owner of the draft; that the draft, after being forwarded through plaintiff's regular correspondents, was in due and regular course of business, upon the 14th day of November, 1906, presented to defendant for payment and payment was refused; that said draft was thereupon protested for nonpayment at a cost of \$3.10, which the plaintiff was compelled to pay—and prays judgment for the face of the draft, with interest and protest fees.

The answer admits the corporate capacity of plaintiff, the drawing of the draft by McMillan, the sending of the telegram by defendant, and his refusal to pay the same, and then proceeds to set out the business relations existing between defendant and McMillan, and a custom under which defendant from time to time made loans to and accepted drafts made by McMillan; that the acceptance in question was a conditional acceptance, which did not bind defendant unless McMillan used the proceeds of the draft for the purchase of horses to be shipped to defendant; that the money was not used for such purpose, but was used for other and different purposes, and that all of these things were "well known to plaintiff, or could, by the exercise of ordinary care, have been known to plaintiff." The reply was a general denial. Trial to the court. Judgment for plaintiff. Defendant appeals.

The question as to whether or not the facts alleged by defendant as an affirmative defense were established upon the trial could only be determined by an inspection of a bill of exceptions. We find, upon examination, that there is attached to the transcript a document purporting to be a bill of exceptions, but no attempt at authentication of the bill is made, as required by section 587b of the code.

We have repeatedly held that in such a case such purported bill of exceptions cannot be considered by us for any purpose, and that this court will, on its own motion, refuse to consider a document appearing in the record, and purporting to be a bill of exceptions, which is not authenticated by the certificate of the clerk of the court below. *Palmer v. Mizner*, 70 Neb. 200.

The only question before us then is: Is the judgment sustained by the pleadings? It is contended that the acceptance upon its face shows it to be a conditional acceptance; that the words "for horses" constituted such a limitation upon the acceptor's liability, that he cannot be held unless it appears that the proceeds of the draft were used for the purchase of horses. This contention implies that it was the duty of the plaintiff, when it cashed the draft for Mr. McMillan, to follow him out of the bank and see to it that he used the proceeds of the draft for that purpose, and no other. Such is not the law. *Bissell v. Lewis*, 4 Mich. 450, and *Coffman v. Campbell & Co.*, 87 Ill. 98, are in point and the reasoning of those cases meets our approval. In *Coffman v. Campbell & Co.*, the acceptance was: "Will pay A. Harper draft, twenty-three hundred dollars, for stock." The exact similarity of that acceptance and the one under consideration here is apparent. In the syllabus in that case it is held: "A telegram agreeing to accept a person's draft for a certain sum, 'for stock,' is not a conditional contract, but an absolute undertaking to accept and pay the same; and a party discounting the draft, on the faith of such telegram, is entitled to recover the amount of the party so agreeing to accept. * * * In a telegram to a party, in relation to a draft, that the person sending the dispatch 'will pay A B's draft, twenty-three hundred dollars, for stock,' the words, 'for stock,' subserves no purpose as between the payee and the acceptor. At most, those words are but an indication of the nature of the consideration as between the drawer and the acceptor."

The reasoning of the majority opinion in *Coffman v.*

Winslow v. Winslow.

Campbell & Co., concurred in by five of the seven justices, is, we think, unanswerable.

AFFIRMED.

DANIEL G. WINSLOW ET AL., APPELLEES, v. JEFFREY W.
WINSLOW, APPELLANT.

FILED APRIL 24, 1911. No. 16,206.

1. **Deeds: DEED FROM PARENT TO CHILD: PRESUMPTIONS.** No presumption arises against the validity of a conveyance from a parent to a child from the mere fact of that relation.
2. ———: ———: ———. When a deed is executed without consideration by an aged parent shortly before her death, whereby all of the grantor's estate is conveyed to one child to the exclusion of her other children, without any apparent reason for so doing, the courts will scrutinize the transaction with care; the presumption is against the validity of the deed.
3. ———: ———: ———: **EVIDENCE.** The evidence is found to be insufficient to overcome the presumption against the validity of the deed from mother to son under the circumstances surrounding its execution.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. H. Edmunds, for appellant.

A. W. Crites and *C. Patterson*, contra.

SEDGWICK, J.

Catherine Winslow died at Pine Ridge, Nebraska, in February, 1907. She was nearly 71 years of age at the time of her death, and left surviving her four children. two sons and two daughters. She owned 320 acres of land which she had acquired under the homestead and pre-emption laws. She had been divorced from her husband, and within the year prior to her death had executed two deeds. In the one she conveyed this land to her son Jeffrey Winslow, and in the other to her daughter, Mrs.

Corder. After her death this action was brought by her heirs to set aside these deeds, and upon the trial in the district court for Sheridan county a judgment was entered canceling the deeds. In this judgment Mrs. Corder acquiesced, but the son Jeffrey Winslow has appealed to this court.

The daughters were married, and one of them, Mrs. Corder, never lived with her mother upon this land until December, 1889; from that time she remained there between three and four years. The other daughter and the two sons lived upon the farm with their mother until the daughter was married and left her mother, in 1899. From that time for about five years the son, Daniel Winslow, who was an unmarried man, tilled the farm, and the son Jeffrey was absent from home. Daniel was away from home on a visit in the winter of 1903-1904, and, when he returned in March of 1904, he found his mother confined to her bed with a broken hip. She appears to have desired that the two sons should jointly care for the farm, but this was not satisfactory to the boys, and the result was that Jeffrey, who was also a single man, remained with his mother. Thereupon at her suggestion a contract of lease was prepared whereby Jeffrey, in consideration of a portion of the crops and a share of the increase of his mother's live stock, was to have the use of the land for five years, but this instrument was not executed until Mrs. Winslow, in June, signed the deed to Jeffrey which is now in question. Jeffrey testified upon the trial that, before the deed was made and during the time that the negotiations for the lease were pending, he agreed with his mother to stay with her and care for her during the remainder of her life; and that before the deed was recorded he gave her \$200 in cash. There was considerable evidence in the case, and the question for the trial court to determine was whether this deed was the voluntary and free act of Mrs. Winslow, or whether it was executed upon impulse caused by undue and improper influence, and without consideration and appreciation on the part

of Mrs. Winslow of the circumstances and conditions then existing, and the true nature and effect of the transaction.

No presumption arises against the validity of a conveyance from a parent to a child from the mere fact of that relation. *Gibson v. Hammang*, 63 Neb. 349; *Ward v. Ward*, 86 Neb. 744. When, however, a deed is executed without consideration by an aged parent shortly before her death, whereby all of the grantor's estate is conveyed to one child to the exclusion of her other children, the courts will scrutinize the transaction with jealous care, and the presumption is against the validity of the deed. *Nelson v. Wickham*, 86 Neb. 46; *Bennett v. Bennett*, 65 Neb. 432. There is some evidence in the record tending to show that one of the daughters had been somewhat neglectful of her mother's welfare, and had failed in some respects in the devotion which a child usually shows toward an aged and decrepit parent, but this daughter had contributed part of her earnings as a school teacher to the family support, and it may be that the thought in her mind that she had not been fully compensated was in some degree the cause of her neglect. During the latter part of her life, Mrs. Winslow was suffering from feeble health and several accidents which she had sustained, and while she was not insane, but had an active mind, she appears to have been of an impulsive disposition, acting frequently without due consideration as to consequences and without that deliberation which might enable her to realize the full result of her actions. Daniel, the youngest of the children, lived at home and worked for the benefit of his mother and the family longer than any of his brothers and sisters. After he had grown to young manhood, he frequently worked out for wages, but brought his wages home, and they also were applied to the use of his mother and the family. The defendant Jeffrey is the eldest son. He appears to have been considerable of a rover and trader, but seems never to have accumulated anything. She seems to have had a penchant for making deeds. She offered at one time to deed the land to her

Winslow v. Winslow.

daughter, the plaintiff, Mrs. Atwater, but Mrs. Atwater and her husband both declined to accept a deed, telling her that that was not the proper thing to do. At another time she made a will in which she gave the home place to Daniel, making certain bequests to some of the others, and giving defendant Jeffrey one dollar. In September, 1903, the fall before she made the deed in controversy here to Jeffrey, she made a deed of the land to Daniel. It was left in a bank. She subsequently went to the bank and got the deed and destroyed it, just as she probably would have done with Jeffrey's deed, had he not recorded it. About two years or so before she died, she went to the office of a Mr. Gilmore, a practicing attorney at Hays Springs, in company with her son Daniel, and asked Mr. Gilmore to draw a will in Daniel's favor. After instructing him as to the provisions of the will, she departed, and about two or three weeks later she returned to the office with Jeffrey and wanted the will changed so as to give everything to him. Mr. Gilmore did nothing further toward preparing the will. He testified that, when he first knew Mrs. Winslow, she was a pretty bright woman, but that at the time she appeared at his office she was not what she was when he first knew her, "that is, in her mental make-up"; that he "figured" she was not mentally competent. On cross-examination he testified: "Q. Had you ever noticed anything along that line until you were inquired of as a witness in this case? A. With reference to this woman? Q. Yes. A. Yes, sir; I did. Q. When was it, and what was it? A. Well, sir, that was why I didn't complete the second will, I figured it was a waste of my time to do it." As above stated, the deed to Daniel was made in September, 1903. Jeffrey and Daniel were both at home during the winter. When they declined to work the farm jointly, as above stated, Jeffrey stayed on the farm and Daniel left. A Mr. and Mrs. Schmidt lived about a mile and a half from the Winslow place. On April 1, 1904, Jeffrey and his mother went to the Schmidt home, and Schmidt prepared for them the five-year lease of the

Winslow v. Winslow.

lands above mentioned. Mr. Schmidt testified that the lease was signed by Mrs. Winslow and Jeffrey at that time, but Jeffrey testified that it was not signed until the date of its acknowledgment, June 16, 1904. He states that, after the lease was drawn, Schmidt told them that it would have to be acknowledged before a justice of the peace. Jeffrey and his mother returned home, leaving the lease with Schmidt. On June 16, 1904, Jeffrey and his mother again went to Schmidt's home, where by previous appointment they were met by Justice Lake and his wife. They all remained at Schmidt's house for dinner. During the forenoon Justice Lake prepared the deed from Mrs. Winslow to Jeffrey for the half section of land. After the deed was signed and acknowledged, Justice Lake handed it to Jeffrey, stating that that now belonged to him. Jeffrey put the deed in his pocket. At that time, or within an hour thereafter, the lease was acknowledged and left in Schmidt's hands. After Jeffrey and his mother had gotten into the buggy to drive home, the mother, Mr. Schmidt testifies, said: "'Jeff, what did you do with that deed?' and he said, 'I have got it,' and she said 'You had better leave it here with Henry Schmidt. It will be safer than if you take it home and put it in your trunk.' So Jeff took it out of his pocket and gave it to me." The deed remained in the possession of Mr. Schmidt until the 13th of the next month, when Jeffrey alone called at the residence of Mr. Schmidt and asked for it. Schmidt gave it to him, and he took it to the county seat and had it recorded. After it was recorded, Jeffrey returned it to Mr. Schmidt. Jeffrey had the deed recorded without the knowledge of his mother. Mrs. Atwater testified that, after her mother's death, she had a talk with Jeffrey, in which he claimed to have paid a thousand dollars for the place, and at another time said that his mother had given it to him; that he also said that his mother had asked for the deed back again after it was made, and he said he did not do business that way. "Q. Did he tell you what induced her to ask for a return of the deed? A. Well,

Winslow v. Winslow.

she was dissatisfied, dissatisfied with him. She wasn't getting the care she should have. Q. That is what he said, was it? A. Yes, sir; that is what he said she told him. Q. And that is why she asked for the return of the deed? A. Yes, sir." This testimony was not denied by Jeffrey. Mrs. Winslow seems to have soon become very much dissatisfied with her life with Jeffrey, and she then opened up correspondence with her daughter, defendant, Mrs. Corder, with a view to having the daughter take her to her home. In the meantime Daniel had ascertained that Jeffrey had a recorded deed for the farm, and had upbraided his mother for giving the deed. This was the first Mrs. Winslow knew that the deed had been recorded. She at once consulted a lawyer, who told her that the deed was void. The five-year lease was also recorded at the same time with the deed. The result of her correspondence with Mrs. Corder was that that lady went to see her mother and talked the matter over with her, whereupon Mrs. Winslow executed a deed to Mrs. Corder for the half section of land, and also gave her a bill of sale of all her personal property, worth about \$500. Mrs. Corder then took her mother to her home at the Pine Ridge agency, where she made her very comfortable until she died, about two months and five or six days thereafter. That Mrs. Winslow even then did not understand that she had made a final disposition of her estate is shown by the fact that during the two months that she was with Mrs. Corder, and not long before she died, in writing to Jeffrey on two different occasions, she told him that she expected to be able to work again pretty soon and then she would return to the farm.

There was evidence tending to prove that she had the use of her mental faculties during all this time, and was capable of transacting business matters, at least those of minor importance and of an ordinary and simple character, but the circumstances, of which we have mentioned a few, as disclosed in the evidence, indicate that she had no fixed purpose as to the final disposition of the prop-

Tate v. Biggs.

erty; her likes and dislikes were momentary, and not based upon an understanding and consideration of actual conditions; that her son Jeffrey was not only willing, but extremely anxious to obtain the property without consideration and to the exclusion of his brother and sisters, and that it was very easy for him to take advantage of his mother's condition, and cause her to do that which was not her own desire, but his alone.

From all the evidence, we conclude that the defendant, Jeffrey W. Winslow, has not produced sufficient evidence to overcome the presumption against the validity of the deed which arises from the circumstances surrounding its execution, and cannot find from all the evidence that he paid any valuable consideration therefor. We therefore conclude that the judgment of the district court is right, and it is

AFFIRMED.

**WILLIAM T. TATE, APPELLEE, V. NEWTON BIGGS ET AL.,
APPELLANTS.**

FILED APRIL 24, 1911. No. 16,410.

1. **Taxation: SALE FOR TAXES: TREASURER'S RETURN.** The return which a county treasurer is required to make to the county clerk of his public sales of real estate for taxes must be certified and signed by him.
2. ———: ———: **NOTICE.** The treasurer's notice of tax sales must contain substantially all of the matters specified in the statute. If it omits the statement that so much of each tract as may be necessary will be sold for the taxes, interest and costs thereon, and that it will be made by the treasurer at public auction on the first Monday of November next thereafter, the sale made pursuant thereto will be invalid.
3. ———: **TAX DEED: CONCLUSIVENESS.** Section 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) will not be construed to mean that a tax deed shall be conclusive evidence of all matters not recited in that section.
4. **Abandonment: TITLE TO REALTY.** Facts recited in the opinion held not to amount to an abandonment of a legal title in real estate. Whether such title can be lost by abandonment, *quære*.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland and Leroy Martin, for appellants.

Courtright & Sidner, contra.

O. S. Allen, amicus curiæ.

SEDGWICK, J.

The plaintiff began this action in the district court for Cheyenne county to set aside a tax deed of certain lands in that county and to redeem the lands from the tax sale. The decree of the district court was in his favor, and the defendants have appealed.

The plaintiff alleged that the land was conveyed by the United States to the Union Pacific Railroad Company, and by that company to one Arthur W. Osborne, who, with his wife, conveyed the land to the plaintiff by deed. The petition alleges many defects in the proceedings resulting in the tax sale and deed; and in his brief plaintiff relies upon three contentions: First, that the notice of sale was defective; second, that no sufficient return of the public sale was made by the treasurer to the county clerk, the sale upon which the deed was issued being a private sale; third, that the sale was excessive.

1. The defendants, who are appellants, contend that the trial court determined the case solely upon the second of the foregoing contentions of the plaintiff, holding that the return of the treasurer to the county clerk was insufficient. There was some controversy in the evidence as to whether any attempt was made by the treasurer to comply with the statute requiring him to make a return of the public sales before selling any of the land at private sale, but we think that it sufficiently appears that the following document in typewriting was filed by the treasurer with the county clerk as his return, and that no other return was made by him:

Tate v. Biggs.

"Land sold at public auction by A. K. Greenlee, Co. Treas. Cheyenne County, Nebraska, 1905.

Number	Date	Sold to	Description	Amount
1251	Nov. 7	Jas. Thompson	N. E. 2-15-49	\$8 95
1252	Nov. 10	L. G. Simon	S. S. E. 5-14-48	24 50

"Sidney, Nebr., Nov. 11th, 1905."

(Indorsed) "Filed Nov. 12, 1905. R. E. Barrett, Co. Clerk."

Section 204 of the revenue act of 1903 (Comp. St. 1903, ch. 77, art. I) provides: "The treasurer shall keep a sale book showing in separate columns the number and date of each certificate of sale, the name of the owners or owner if known, the description of each tract of land or town lot, the name of the purchaser, the total amount of taxes and costs for which sold, the amount of subsequent taxes paid by the purchaser and date of payment." Section 205 is as follows: "On or before the first Monday of December following the sale of real property, the treasurer shall file in the office of the county clerk a return thereon as the same shall appear on the treasurer's sale book and such return duly certified shall be evidence of the regularity of the proceedings." Section 206 provides that lands may be sold at private sale after "the treasurer shall have made his return."

The revenue law of 1879, which was replaced by the act of 1903, also provided that private sales might be made after the treasurer had made return of his public sale, and under that act it was many times held by this court that no valid private sale could be made by the treasurer until after he had made this return. The defendants contend that the statement filed with the county clerk by the treasurer without the signature of the treasurer or any certificate thereon is sufficient. If a return of the public sales must be made by the treasurer before any valid private sale can be made, as has been so often held by this court, it must be, of course, such a return

as the statute prescribes; that is, whatever the statute directs as to the form and character of the return must be complied with or it cannot be said to be a return at all, within the meaning of the statute. Does the statute intend that the return shall be signed and certified to by the treasurer? The act of 1879 (laws 1879, p. 275, sec. 112) provided that after making the public sale the treasurer should file "a return thereof, as the same shall appear on said sale book, and such certificate shall be evidence of the legality of the proceedings." The former act called the return a "certificate", and, of course, unless it contained some language that would amount to an assertion by the treasurer that it was a correct return of his proceedings, it could not be a certificate, and would not be such a return as was contemplated by that act. There is no apparent reason for a change of the phraseology. We think that the language of the act of 1903 must have the same construction. The return must be filed, and such return must be duly certified. The word "return" has a legal meaning, more or less definite and certain. Webster's New International Dictionary defines it: "(a) The rendering back or delivery of a writ, precept, or execution, to the proper officer or court. This is now usually done by filing the document, properly indorsed, in the clerk's office. (b) The certificate of an officer stating what he has done in or about the execution of a writ, precept, etc., indorsed on the document. (c) The sending back of a commission with the certificate of the commissioners." The treasurer derives his authority to make the sale from the tax list furnished him by the county clerk. This list is in some respects analogous to a writ of execution, and this affords some explanation of the use of the technical word "return" in the statute. The act of 1879 did not require this return to show the name of the owners or owner of the land, but by the act of 1903 this is required, but the paper relied upon as a return does not give this information. We think the trial court was right in holding that there was no sufficient return by the treasurer of the public sale.

2. One of the objections made by plaintiff against the validity of the tax deed is that the notice of the tax sale is insufficient. The act of 1879 provided for no notice, but by the amendment of 1885 a notice of tax sale was required, and the statute provided what it should contain. "The notice shall contain a notification that all lands, on which the taxes of the preceding year, naming it, remain unpaid, will be sold, and the time and place of the sale, and said notice must contain a list of the lands to be sold and the amount of taxes due thereon." Laws 1885, ch. 73, sec. 1 (109). The notice published was as follows: "Notice of Tax Sale. The following is a list of lands and town lots on which taxes for the year 1904 and prior years are delinquent and unpaid, and which will be offered for sale for taxes at the county treasurer's office in the village of Sidney, Cheyenne county, Nebraska, on and after the first Monday in November, 1905, between the hours of 9 o'clock A. M. and 4 o'clock P. M. A. K. Greenlee, County Treasurer. October 1, 1905. Township 12, range 47, sec. 1 nw, \$2.60; 2 sw, \$13.68," etc. It appears to substantially comply with the amendment of 1885. The act of 1903 required that the "treasurer shall * * * make out a list of all lands and town lots subject to sale, and the amount of all delinquent taxes against each with interest to the date of sale, describing such land and town lots as the same are described on the tax list, with an accompanying notice stating that so much of each tract of land or town lot described in said list as may be necessary for that purpose will, on the first Monday of November next thereafter, be sold by him at public auction." Comp. St. 1903, ch. 77, art. I, sec. 194. The published notice offers only the entire tract; it fails to state that so much of each tract as may be necessary will be sold. It does not state that the sale will be made by the treasurer, nor that it will be at public auction, nor that it will be for the taxes, interest and costs thereon, nor that it will be on the first Monday of November next thereafter. This notice is not a compliance with the present statute.

3. The third objection which the plaintiff makes to the tax deed is that the land was sold for a greater amount than the taxes, interest and costs thereon. It is claimed that the entire land was sold without offering to sell "so much of each tract * * * as may be necessary * * * for the taxes, interest and costs thereon," and that it was sold for more than the taxes, interest and costs amount to. Of course, such a sale would be invalid, but these allegations are disputed by the defendant, and the parties appear to derive different results from the computation which they have made. The sale is invalid for the reasons given, and we do not find it necessary to discuss these computations.

4. It is contended that the statute makes the tax deed conclusive as to the matters herein discussed. Sections 220 and 221 of the act of 1903 (Comp. St. 1903, ch. 77, art. I) are taken entirely from section 130 of the act of 1879 (laws 1879, p. 328), omitting a few significant words. The first part of said section 130 is as follows: "Deeds made by the county treasurer as aforesaid shall be presumptive evidence in all the courts of this state, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: (1) That the real property conveyed was subject to taxation for the year or years stated in the deed; (2) that the taxes were not paid at any time before the sale; (3) that the real property conveyed had not been redeemed from the sale at the date of the deed; (4) that the property had been listed and assessed; (5) that the taxes were levied according to law; (6) that the property was sold for taxes as stated in the deed; (7) that notice had been served and due publication had as required in section 123 of this chapter, before the time of redemption expired." It then provides that the treasurer's deed shall be conclusive evidence of certain things, and concludes the section with the provision, which is inserted as section 221 of the act of 1903, and is as follows: "And in all controversies and suits

involving the title to real property claimed and held under and by virtue of a deed made substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid; provided, that in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; provided, further, that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void." This made it incumbent upon the person claiming the title adverse to the tax deed to disprove matters of which the tax deed was presumptive evidence, but this language in the said section 130 could not be construed to mean that a tax deed was conclusive evidence of any of those things of which the section expressly provided that it should be presumptive evidence only. In the act of 1903

the words "and it shall be conclusive evidence of the following facts", which were found in the former act, were omitted, and those facts of which the tax deed was made the conclusive evidence in the former act were in the latter act added to section 220, which specifies the facts of which the tax deed shall be presumptive evidence. The two sections of the present law must be construed together and made consistent with each other. To hold that the tax deed is conclusive evidence of all matters not recited in section 221, as urged by defendants, would make that section inconsistent with section 220, which provides that the tax deed shall be presumptive evidence only of the matters therein specified. The legislature will be presumed to have knowledge of the construction that had been given to section 130 of the act of 1879, and to have intended the same construction to be given to similar language in sections 220 and 221 of the present act. By omitting to provide that the tax deed shall be conclusive evidence of these matters and classifying them all as matters of which the tax deed is presumptive evidence only, the legislature must have intended that section 221 would be construed as the same language has been construed many times by this court while the act of 1879 was in force, and that language has always been construed as consistent with that part of the said section 130 which made the tax deed presumptive evidence only of certain matters therein so specified. Section 221, therefore, of the present act, which recites some of those things of which the tax deed is presumptive evidence, cannot be construed to intend to make the tax deed conclusive evidence of all matters not therein recited. The notice of sale must be given substantially as the statute provides, and the treasurer must make return of his public sales before selling lands at private sale. The tax deed is not conclusive evidence that these requirements have been complied with.

5. At the conclusion of the trial the defendants asked leave to amend their answer by inserting a plea of aban-

Hanks v. State.

donment of the land by plaintiff's grantor, and estoppel by reason of laches. The court refused to permit such amendment, and this ruling is now assigned as error. The plea offered, after stating the conclusion of the pleader that there had been such abandonment, alleges the facts upon which such conclusion is predicated. They are that Osborne, plaintiff's grantor, for a long time prior to 1908 (date of plaintiff's deed) failed to pay the taxes duly levied upon the land, and failed and refused to place his deed of conveyance from the Union Pacific Railroad Company upon record with the further allegation that, "by reason of such abandonment and the tax proceedings herein, the said Osborne and plaintiff are estopped by their acts aforesaid to reassert title to said premises and to question the validity and regularity of the proceedings upon which defendants' title is based." At common law legal title to land could not be lost by abandonment. If this rule is applicable to our conditions it has been adopted by our statute. This, however, we do not find it necessary to determine in this case, since the acts pleaded would not amount to an abandonment, even in those jurisdictions which have followed the rules of the Spanish law.

The decree of the district court is

AFFIRMED.

JERRY J. HANKS V. STATE OF NEBRASKA.

FILED APRIL 24, 1911. No. 16,749.

MOTION for rehearing of case reported in 88 Neb. 464.
Motion overruled. Sentence reduced.

SEDGWICK, J.

The motion for rehearing is based principally upon the insufficiency of the evidence to support the conviction. It

Hanks v. State.

is contended that the evidence does not show beyond a reasonable doubt that the prosecuting witness resisted the advances of the defendant to the extent of her ability. The evidence is not conclusive that she objected with any degree of determination to some of defendant's conduct of which she now complains. Considering her youth and surroundings, the jury may have found that, although her conduct was not such as is expected of young women of chaste character, she never contemplated that the defendant would attempt the act which constituted the crime, and was surprised and overpowered by him. In view of the character of this evidence and of the circumstances under which it is alleged that this crime was committed, and especially the youth and former history and surroundings of defendant, we think that the penalty imposed is too severe. There is some argument in the brief upon matters that are not properly in the record. The technical objections urged have, perhaps, been already sufficiently discussed. The punishment imposed by the district court is reduced to three years' imprisonment in the penitentiary, and in all other particulars the former opinion is adhered to, and the motion for rehearing is

OVERRULED.

ROSE, J., dissenting.

I concur in the order denying a rehearing, but dissent from the reduction of the sentence. Defendant was convicted of rape. The statutory penalty is imprisonment in the penitentiary for not more than twenty years nor less than three years. Criminal code, sec. 12. The trial court imposed a sentence of seven years and the majority now reduce it to three—the minimum. The jury, the trial court and this court have said the evidence is sufficient to sustain a conviction. The testimony tends to show that defendant had ostentatiously fixed the night before the felony as a time to indulge his lust for prosecutrix. In my opinion it is fairly inferable from all the circumstances that he had not done so at any previous time. I

Allen v. School District.

do not think the evidence justifies the inference that prosecutrix was unchaste when she was assaulted. A defendant who has been found guilty of rape cannot be sentenced for a shorter period than three years, even where his victim is a common prostitute, and I am unwilling to concede that the sentence in this case should be reduced to the minimum.

ROOT, J., concurs in the dissent.

OSCAR ALLEN, APPELLEE, v. SCHOOL DISTRICT NOS. 19 AND 41, JOINT, OF BUFFALO AND HALL COUNTIES, NEBRASKA, APPELLANT.

FILED APRIL 24, 1911. No. 16,920.

1. **Schools and School Districts: BONDS: ELECTIONS: NECESSITY FOR PETITION.** Section 3, subd. XV, ch. 79, Comp. St. 1909, requires that, before an election is called under the preceding section upon the question of issuing bonds of the school district, a petition must be filed with the school board suggesting the calling of such election, and that such petition must suggest that the bonds be issued for some one or all of the purposes specified in the statute. An election for that purpose called without such petition is invalid and does not authorize the issuing of the bonds.
2. ———: ———: ———: **SUFFICIENCY OF PETITION.** In such case, if the petition suggests that the bonds be issued "to build a new public school building," an election called to vote upon the proposition to issue bonds for the purpose of "building and furnishing a new school house" is invalid.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

John J. Sullivan, for appellant.

E. C. Page, contra.

SEDGWICK, J.

The defendant school district issued bonds in the sum of \$30,000, and the plaintiff contracted with the district to purchase the bonds when they were duly issued so as to be a valid and binding obligation of the district, and deposited his check with his proposition to buy the bonds, and the check is now under the control of the school district. The plaintiff has demanded the return of the check on the ground that the bonds are invalid.

Under the stipulation of facts, the question depends upon the validity of the bonds, and that in turn depends upon the sufficiency of the petition filed with the school board suggesting the calling of the election. Section 2, subd. XV, ch. 79, Comp. St. 1909, provides: "No bonds shall be issued until the question has been submitted to the qualified electors of the district, and two-thirds of all the qualified electors present, and voting on the question, shall have declared by their votes in favor of issuing the same at an election called for the purpose, upon a notice given by the officers of the district, at least twenty days prior to such election." Section 3 of the same subdivision provides: "No vote shall be ordered upon the issuance of such bonds, unless a petition shall be presented to the district board, suggesting that a vote be taken for or against the issuing of such amount of bonds as may therein be asked for, to purchase a site for, or build a school house, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes, which petition shall be signed by at least one-third of the qualified voters of such district; provided, that the board of education in any city of the metropolitan class may order a vote upon the issuance of such bonds, without a petition therefor." The petition presented to the district board suggested that a vote be taken for or against the issuing of the bonds in the amount of \$30,000 "to build a new public school building." The petition was regular in form and signed by

Allen v. School District.

the required number of petitioners, and pursuant thereto an election was called and notice thereof duly posted as the law requires, in which notice it was stated that the proposed bonds were to be issued for the purpose of "building and furnishing a new school house" The objection to the legality of the bonds is that the election was called for the purpose of voting upon the question of issuing bonds for the building and furnishing a new school house, and the petition of the voters authorizing the calling of the election suggested the single purpose of building, and not of furnishing. It appears to be conceded that the provisions of the statute are mandatory, and must be substantially complied with, or the bonds issued will not be valid.

The argument is that they have been substantially complied with. The question depends upon the meaning of the third section. The purposes for which the electors may by petition suggest the calling of an election to vote upon the question of issuing bonds are: "To purchase a site for, or build a school house, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes." It seems clear that the school board is without power to call an election to issue bonds for any purpose that is not suggested in the petition signed by the necessary number of electors of the district. Bonds that are issued for any purpose that is not suggested by this petition are issued in violation of the statute. In the petition filed by the voters in this case there was no suggestion that bonds be issued for the purpose of furnishing the school house. Therefore the school board was without authority to issue bonds or to call an election for that purpose. The fact that the voters may suggest the issuing of the bonds for any and all of the purposes mentioned does not authorize the calling of an election for all of the purposes mentioned in the statute, unless such action is suggested in the petition. This seems to us to be the plain meaning of the statute, and we think that there is a substantial reason

Allen v. School District.

for such restriction upon the power of the board. It will be noticed that at the election it is not required that a majority of the voters of the district shall declare by their votes in favor of issuing the bonds, but only two-thirds of those present and voting upon the question. This may be a very small minority of the qualified voters of the district. One-third of all the voters of the district may be in favor of issuing bonds for the purpose of building a new school house, but not in favor of expending the money so raised for new furniture. Undoubtedly it is often expected that a new building will be newly furnished, but, if the furniture already owned by the district is sufficient for the new building in the judgment of the electors, the statute permits them to so determine. Manifestly the several purposes for which bonds may be issued as named in the statute are separate and distinct, and the intention of the statute is to prevent a small minority who may participate in the election from devoting the proceeds of the bonds to any one of these purposes, not suggested in the petition. It must first be ascertained that at least one-third of the electors of the district are in favor of so expending the money raised by the issuing of the bonds. School districts are classified by statute, and ordinary districts which contain no city of 1,500 or more inhabitants cannot hold an election to vote upon the question of issuing bonds for any of the purposes enumerated in the statute, unless such purpose is suggested by petition of at least one-third of the electors of the district. In districts which include cities having a large number of inhabitants many questions are necessarily referred to the representatives of the people; but in the smaller districts all of the electors are informed as to the condition and needs of the district, and the burden of taxation for the support of the school falls upon so few individuals that they are expected to consider and determine such matters for themselves without the necessity of delegating such authority. The requirement of this petition before calling the election guarantees that

Nocita v. Omaha & C. B. Street R. Co.

at least one-third of all of the electors in the district approve of issuing bonds in the amount named for the particular purpose specified, and the funds so provided must be devoted to the purpose specified, and not devoted to any purpose named in the statute, and not specified in the petition. Therefore the distinction that the statute makes is not a technical one, but is substantial, and whether the policy of the legislature in this regard is sound or otherwise, the courts are without power to interfere.

This was the judgment of the district court, and we conclude that it is right, and it is therefore

AFFIRMED.

**ANTONINO NOCITA, APPELLEE, V. OMAHA & COUNCIL
BLUFFS STREET RAILWAY COMPANY, APPELLANT.**

FILED MAY 6, 1911. No. 16,359.

1. **Master and Servant: FELLOW SERVANTS.** "Employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some co-sociation in the same department of duty or line of employment." *Union P. R. Co. v. Erickson*, 41 Neb. 1.
2. **Carriers: INJURY: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** "Whether the act of a party in attempting to board a moving street car is negligence or not is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case." *Omaha Street R. Co. v. Martin*, 48 Neb. 65.
3. **Trial: NEGLIGENCE: QUESTIONS FOR COURT AND JURY.** "It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence." *Omaha Street R. Co. v. Martin*, 48 Neb. 65.
4. **Carriers: INJURY: NEGLIGENCE.** Even if the rule, sometimes announced, that the unbending test of negligence is the ordinary usage of the business in which defendant was engaged is the

Mecita v. Omaha & C. R. Street R. Co.

law, it could have no application to the question of negligence growing out of a sudden and violent jerking and starting of a street car, by which a plaintiff was injured.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Green, Breckenridge & Matters, for appellant.

James O. Kinsler, contra.

REESE, C. J.

This is an action for damages resulting from a personal injury. Plaintiff recovered a judgment, and defendant appeals.

No serious question is presented as to the pleadings, and they will not be noticed, except to say that they are in the usual form, and the issues presented by the contentions of the parties will be sufficiently stated by the discussion of the points raised.

The evidence is, to some extent, conflicting, but when considered as a whole the conflict is more apparent than real. There was sufficient submitted to the jury to sustain a finding that, at the time of the accident plaintiff was in the employ of defendant as a laborer on the extension of defendant's line of street railway from Albright to Fort Crook, and in the group of workmen known as "spikers," whose duty it was to drive spikes into the cross-ties, and by which the track rails were held in place; that he and practically all the other laborers on the construction work resided in the cities of Omaha and South Omaha, and defendant provided a work train consisting of a motor car and flat car trailer, by which the men and materials were transported from the cities named to and from their work on the extension line; that on the morning of the accident plaintiff and another were standing on the street crossing waiting for the approach of the car, as was their custom; that, as the car approached the place where they were standing, plaintiff

signaled the motorman to stop, in order that he and the other person might board the car to be carried to their work; that there had been a rain that morning, or during the night before, and it was then cloudy, and plaintiff was carrying his dinner bucket and an umbrella; that, upon his signal being given, the motorman cut off the electrical current, or power, and applied the brakes, for the purpose of stopping the cars; that the cars were brought to nearly a full stop at the usual stopping place, when plaintiff sought to get on board, and in doing so caught hold of the upright prepared for that use and stepped with one foot upon the step of the car, when at that moment the power was applied and the car was jerked violently forward, throwing plaintiff under the car in such a way as to cause his lower limbs to come under the wheels, one leg being run over near the knee, and being so badly crushed and lacerated as to require its amputation above the knee, and the foot of the other being so crushed as to require the amputation of one of his toes. No question is raised as to the fact of the injuries, as above stated, nor as to the amount of the recovery, provided plaintiff is entitled to recover at all. By the answer, all negligence of defendant is denied, and it is alleged that "the injuries received by the plaintiff were directly caused by his own negligence in attempting to board its car while the same was in motion."

It is alleged in the petition that the speed of the car was "slowed down" as it approached and crossed Williams street, until it came to almost a stop at the usual stopping place on the south side of Williams street. The evidence all showed that the car had not entirely ceased its motion when plaintiff attempted to get on board, and such is conceded to be the fact. But there was sufficient evidence to sustain a finding by the jury that the car (or train, as it is called in the evidence) came almost to a full stop at the usual place for stopping cars to receive and discharge those who might desire to board or leave the cars, and that at the time plaintiff

sought to get on board the rate of speed was not to exceed one-quarter of a mile an hour, or one mile in four hours, which would scarcely amount to a movement—much less than one-half the speed an ordinary person would walk.

The question of the negligence of plaintiff in undertaking to board the car while so moving was submitted to the jury with appropriate instructions. There was also sufficient evidence to warrant the jury in finding that just at the moment when plaintiff took hold of the support and placed his foot upon the step, where the motorman saw or could have seen him, the cars were started forward with such a violent jerk as to dislodge those on board from their seats, and by its action pull or jerk plaintiff loose from his hold and throw him under the car wheels. This question of negligence on the part of defendant was also submitted to the jury with proper instructions. Thus we have the question of the negligence of both parties submitted to the jury.

After the close of the evidence, counsel for defendant moved the court to instruct the jury to return a verdict in favor of defendant, and assigned the following grounds therefor: “(1) That the testimony fails to show, and does not tend to show, that the injury to the plaintiff resulted from actionable negligence on the part of the defendant as the proximate cause thereof. (2) The testimony shows that the defendant’s motorman, at the time of the accident to the plaintiff, was operating the motor train in the usual and customary manner. (3) The testimony shows that the plaintiff’s conduct, in attempting to board the train before it came to a stop, was the proximate cause of his injury. (4) If neither defendant nor plaintiff were guilty of negligence proximately contributing to the injury, then the injury was itself an accident. (5) If said injury resulted from the negligence of Gillespie, such negligence was the negligence of a fellow servant of the plaintiff, and he cannot recover.” (Gillespie was the motorman in charge of the car.)

As to the first ground for the motion, we have already said in substance, that what the testimony showed or failed to show as to negligence on the part of defendant was solely for the jury. The testimony of the witnesses, not entirely harmonious, was before them, and it was for them to decide. As to the second, it can hardly be said that the evidence showed conclusively that the motor train was operated in the usual and customary manner, even if the fact, if shown, would constitute an absolute defense, which we do not concede.

As to the third ground, no court could rightly hold that, as matter of law, under the circumstances as detailed by some of the witnesses, plaintiff was guilty of contributory negligence which was the proximate cause of his injury. If the facts were as detailed by some of the witnesses, he probably was not. It was for the jury to decide as to which theory of the facts was the correct one.

As to the fourth and fifth grounds, they clearly involved questions of fact which it was not the province of the court to decide. The motion was rightly overruled. Under the evidence, the cause presented questions of fact which could only be submitted to the jury for solution. If the evidence most favorable to plaintiff was believed by the jury, they were justified in finding that, under the circumstances, plaintiff was not guilty of negligence in his efforts to board the train, owing to its very slow movement, for, for all practicable purposes, it had come to a full stop, and but for the violent lurch or jerk forward he would have been in no danger whatever, and therefore guilty of no negligence. This being true, the cases cited by defendant upon this point are not controlling.

It is insisted that the court erred in refusing to give to the jury instruction numbered 2 asked by defendant. The instruction is quite lengthy, and need not be set out here in full. We may assume that it was in part correct, yet other portions were inapplicable to the case. It was sought to have the jury instructed that, in order to justify a finding that "defendant, through its motorman, was

Nocita v. Omaha & O. B. Street R. Co.

negligent in the operation and control of the motor car that ran over Nocita's leg, the plaintiff must establish, by a preponderance of the evidence, that the car was not operated as such cars and trains are ordinarily operated under similar circumstances and conditions; for the unbending test of negligence is the ordinary usage of the business. And the mere fact that an accident happened and the plaintiff received an injury does not raise any presumption that the defendant was negligent in the operation of its motor car and train." While the writer hereof takes little stock in the "unbending test" rule, as each case should be governed by its own facts and circumstances, yet, under no circumstances, could the so-called "unbending test" rule be applied to this case, even if it were a rational one, as there was no proof that the "ordinary usage of the business" was to apply the full force of the power just at the moment of time when plaintiff would be thrown from the car, as he was, and subjected to the danger of the injury, which he actually suffered. The question of the general operation and management of the train and cars was not in the case, and the cases cited do not apply.

Complaint is made of the refusal of the district court to give the fifth instruction asked by defendant. This instruction was a direction to return a verdict in favor of defendant, and contained the statement that plaintiff and the motorman were fellow servants; that defendant was not liable for the motorman's negligence, and the verdict should be in defendant's favor. There was no error in refusing this instruction. There is nothing in the evidence which proves that the motorman and plaintiff were fellow servants. Plaintiff, when at his work, was engaged in spiking down the rails. Gillespie, the motorman, was serving as lineman, putting up poles and wires at a distance from the track layers. True, they were the servants of the same employer, but they were not engaged in the same kind of labor. Plaintiff was under the foreman of the "gang" with which he labored, while Gillespie,

was at that time the foreman of the wiring gang. A part of his duties was to run the cars from Omaha to the place of disembarkation, but in this there was no connection whatever with the transportation of plaintiff, such as to render them fellow servants. *Union P. R. Co. v. Erickson*, 41 Neb. 1, 13. "The plaintiff was not associated with defendant's motorman in running the car. His employment was in nowise connected with the operation of cars. For these reasons, plaintiff was not a fellow servant of the motormen." *Haas v. St. L. & S. R. Co.*, 111 Mo. App. 706, 715, 90 S. W. 1155, 1157.

It is insisted that the court erred "in applying the so-called 'last chance' doctrine to the facts of this case, and the misstatement of that rule." In this connection reference is had to the tenth instruction given to the jury. That instruction is too long to be here copied. Its substance is that if, in considering the question of the contributory negligence of plaintiff, such negligence would not necessarily prevent a recovery, if, after placing himself in a place of danger, the motorman saw or might have seen him and negligently failed to stop the car, or negligently started it with a jerk while plaintiff was so situated, such negligence was the proximate cause of plaintiff's injury. As hereinbefore stated, the car in which plaintiff sought passage had practically come to a stop at the time he attempted to board it. There was perhaps no negligence on his part in making the attempt. At any rate, the question was for the jury to decide. *Omaha Street R. Co. v. Martin*, 48 Neb. 65. There is practically no dispute but that, at the time plaintiff made the effort to enter the car, the train was sent violently forward with such force as to break the hold of plaintiff and throw him under the wheels of the car. The jury must have found, and rightly too, that the act of the motorman was one of negligence—a needless, careless, affirmative act, by which the life of plaintiff was endangered. If any objection to the instruction could be maintained, it would be that it was more favorable to defendant than the facts war-

In re Estate of Sieker.

ranted. However, the instruction was evidently given to cover the case as contended for by defendant, and does not contain a misstatement of the law to its prejudice. It was properly given. *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 71.

We find no error in the record prejudicial to defendant, and the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF KARL SIEKER.

HEINRICH SIEKER, APPELLANT, V. AUGUST SIEKER, ADMINISTRATOR, ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,393.

Wills: PROBATE: NOTICE. Section 140, ch. 23, Comp. St. 1909, provides that the notice of the time and place for hearing an application for probating a will shall "be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct." This confers the discretion upon the county court to order the notice to be given personally to all persons interested, or, instead thereof, that it be given by publication. The fact that the immediate relatives of the decedent all reside within the county where the application for probate is made will not render bad the service by publication, and the court will have jurisdiction to hear the cause and decide the questions involved in such hearing.

APPEAL from the district court for York county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

France & France, for appellant.

C. F. Stroman and Power & Meeker, contra.

REESE, C. J.

Karl Sieker, a resident of York county, died testate in said county on the 9th day of December, 1907, leaving a

In re Estate of Sieker.

widow and a family of children, of which plaintiff was one. After the death of Karl, and on the 10th day of February, 1908, his will was presented to the county court for probate. The widow and all the heirs resided in York county. Upon the production of the will, with the petition of August Sieker, for its admission to probate, the county judge made an order reciting the fact of the application for the probating of the will, and fixing the 7th day of March, 1908, at the hour of 10 o'clock A. M., at the judge's office, as the time and place for hearing the petition, and directed that the order be published for three successive weeks in the York County Republican, a weekly newspaper published and of general circulation in said county, "when all persons interested in said matter may appear and show cause why the prayer of petitioner should not be granted." The notice was published as ordered, and on the date named the will was admitted to probate, and, the widow declining to act as executrix, August Sieker was appointed administrator with the will annexed. In October, 1908, plaintiff filed his petition in the county court praying that the order probating the will might be vacated and set aside, and the application for its probate be opened in order that he might contest the same. The reasons assigned by him for the opening of the case, though deemed meritorious by him, need not be stated here. His petition was denied by the county court, when he appealed to the district court, where the order made by the county court denying his petition was affirmed. Plaintiff appeals to this court.

The only contention by plaintiff is that the publication of the notice was not sufficient to give the county court jurisdiction to hear the matter of the probating of the will. The widow and heirs, of which plaintiff is one, all resided in York county. No personal service was had upon any of them, and plaintiff had no knowledge of the proceeding until long after the entry of the decree. The sole question therefore is: Was the publication of the notice all that the law required?

In re Estate of Sicker.

The statute providing for notice of an application for the probate of a will is section 140, ch. 23, Comp. St. 1909 (Ann. St. 1909, sec. 5005), and is as follows: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, previous to the time appointed, and no will shall be proved until notice shall be given as herein provided." By this section there appears to be a discretion lodged with the county judge to cause the notice to be served personally or by publication. It will be observed that the notice is not specifically required to be given to the heirs, but to "all persons interested." This is probably the reason why the practice has become almost universal to give the notice by publication, for no court can know in advance who may be interested in the matter of the probate of a will. The "interest" may be confined to heirs, devisees and legatees, or it may extend to others unknown to the county judge and to the petitioner. In case the order should be for personal service, it is quite possible that no jurisdiction would be had over "interested" parties not served, and, as to them, the proceeding be void. By giving the notice by publication this danger is avoided.

In Dame, Probate and Administration, sec. 82, in discussing the question of notice, it is said: "The method of service of the notice rests in the discretion of the court. It may be by personal service upon all parties interested, or by publication in such newspaper, printed in this state, as the court may direct, for three successive weeks previous to the time appointed. The notice must appear in three successive publications of the paper designated. It is not necessary that the last publication be 21 days from the first. The practice generally prevailing is to give

notice by publication, and thus avoid the necessity of the court passing upon the question, without having the evidence before it, of who are interested in the estate."

In 2 Black, Judgments (2d ed.) sec. 635, it is said: "The action of a probate court having jurisdiction, in admitting a will to probate or in rejecting it, is in the nature of a proceeding *in rem*, and, so long as it remains in force, it is conclusive as to the due execution and the validity of the will, both upon all the parties who may be before the court and upon all other persons whatever, in all proceedings arising out of the will or where the parties claim under or are connected with it—(citing a number of cases in the note). 'The proceeding,' says the supreme court of Vermont, 'is in form and substance upon the will itself. No process is issued against any one, but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject matter of the proceeding. The judgment is upon the thing itself; and, when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be'"—citing *Woodruff v. Taylor*, 20 Vt. 65. We have examined this case, and, while not founded upon a cause similar to the one under consideration, it contains a clear exposition of the difference between cases *in rem* and *in personam*, and shows quite clearly that in the former class of cases, where notice is given by publication, the *status* of the *rem* (the thing) is conclusively established.

The case of *Miller v. Estate of Miller*, 69 Neb. 441, is cited with confidence by defendant. We are unable to ascertain from the opinion what notice of the hearing upon the petition to probate the will was given, but assume that it was by publication, since it was alleged by

In re Estate of Sieker.

the plaintiff that he had no actual notice or knowledge of the time set for hearing, nor for a long time after the rendition of the decree probating the will. The court, by ALBERT, C., held that the probating of a will was a proceeding *in rem*, and that actual notice was not essential to the validity of the decree.

In *In re Estate of Brusha*, 87 Neb. 254, the contention was that the order appointing an administrator was void for want of sufficient notice. The notice was given by publication. The language of the statute (Comp. St. 1909, ch. 23, sec. 195) upon the subject of notice is the same as in section 140, now under consideration, the notice to be given "by personal service on all persons interested, or by publication under an order of such court in such newspaper printed in this state as he (the judge) may direct." In that case we held that "this statute leaves the matter to the probate court to determine what publication shall be made in case personal service is not had upon the parties interested." The same rule should be applied to section 140.

We have given due consideration to the carefully prepared brief filed by appellant, but we are satisfied that the provisions of the civil code cited cannot be applied to this case. The publication of the notice was in compliance with the statute, and the order of the county court directing the publication was sufficient authority without the previous filing of an affidavit therefor. While we think the procedure was in strict conformity with the statute, yet, did we hesitate to so hold, we would not be inclined to adopt the view contended for by plaintiff, for to so decide would overturn a great majority of the orders admitting wills to probate, as the almost universal practice has been that followed by the county court in this case, and it has become a rule of property, and titles acquired thereunder should not be thus disturbed. See *White v. German Ins. Co.*, 15 Neb. 660.

The judgment of the district court holding the notice sufficient is

AFFIRMED.

OMAHA COOPERAGE COMPANY, APPELLEE, V. CENTRAL
STATES COOPERAGE COMPANY, APPELLANT.

FILED MAY 6, 1911. No. 16,423.

Contracts: BREACH: PETITION: SUFFICIENCY. Petition examined, its substance stated in the opinion, and *held* sufficient to resist a general demurrer.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

William H. Crow and Joseph Crow, for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

Action to recover damages for breach of contract for the purchase and sale of certain cooperage supplies. Defendant filed a general demurrer to the plaintiff's petition, which was overruled. Defendant elected to stand upon its demurrer, and judgment was rendered for the plaintiff. Defendant has appealed.

It appears from the allegations of the petition that the plaintiff, at the dates named therein, was a corporation organized under the laws of the state of Nebraska, and was doing a cooperage business at South Omaha, in said state; that the defendant, at that time, was a corporation duly organized under the laws of the state of Indiana, and was engaged in the sale of cooperage supplies at New Castle, in that state; that the plaintiff desired to purchase certain cooperage supplies for the purpose of carrying on its business, and on the 8th day of February, 1907, wrote the defendant the following letter: "South Omaha, Neb., Feb. 8, 1907. Central States Cooperage Co., New Castle, Ind. Gentlemen: We are in the market for car-load of 23½" mill-run heading, and also a car-load of mill-run, No. 1, or No. 2, 19½". If you have anything to offer

Omaha Cooperage Co. v. Central States Cooperage Co.

kindly quote us, and oblige. Yours truly, Omaha Cooperage Company, R. M. Welch, President." On the receipt of this letter, the defendant wrote the plaintiff as follows: "New Castle, Ind., 2-11-07. Omaha Cooperage Co., South Omaha, Neb. Gentlemen: Referring to your favor 8th received, we quote you on M. R. 23½" heading, 13 cents, No. 2, 19½", 7½ cents, and No. 1, 8½ cents, delivered South Omaha. We could make shipment of this stock within the next 30 days if the order was placed at once. Respectfully, Central States Cooperage Company, by H. E. Jennings."

It thus appears that the defendant responded to the exact inquiry made by the plaintiff, and further advised the plaintiff that it could make the shipment within 30 days if the order was placed at once. After the receipt of that letter, and on the 13th day of February, the plaintiff replied as follows: "South Omaha, Neb., February 13, 1907. Central States Cooperage Co., New Castle, Ind. Gentlemen: Your letter 11th. Please book our order for car-load of M. R. 23½" heading at 13c and a car-load of 19½" heading at 8½c delivered, shipment to be made within the next 30 days. We want the car-load of 19½" heading just as soon as we can possibly get it, and we would thank you to rush all possible. Yours truly, Omaha Cooperage Company, R. M. Welch, President."

The petition charges that each and all of said letters were signed by the parties whose names are subscribed thereto, and were received by the parties to whom the same were addressed. Again, on February 19, the defendant wrote the plaintiff in relation to its order the following letter: "New Castle, Ind., 2-19-07. Omaha Cooperage Co., S. Omaha, Neb. Gentlemen: Feb'y 11th in answer to your inquiry we quoted you on 23½" and 19½" heading. We are very desirous of having your order for this stock, and if same has not already been placed we would be pleased to hear from you. Respectfully, Central States Cooperage Company, by H. E. Jennings."

It thus appears that the defendant again renewed its

offer to sell the specific cooperage ordered by the plaintiff at a specified price. On February 21 the plaintiff replied to the defendant as follows: "South Omaha, Neb., February 21, 1907. Central States Cooperage Co., New Castle, Ind. Gentlemen: Referring to yours of the 19th, on February 13th we wrote you as follows: 'Your letter 11th. Please book our order for car-load of M. R. 23½" heading at 13c and a car-load of 19½" heading at 8½c delivered, shipment to be made within the next 30 days. We want the car-load 19½" heading just as soon as we can possibly get it, and we would thank you to rush all possible.' Please be governed accordingly. Yours truly, Omaha Cooperage Company, R. M. Welch, President." By this letter the plaintiff again accepted the defendant's offer, and asked it to ship the cooperage at once. These letters were aided by the proper and necessary averments, and they seem to be amply sufficient to establish a contract of purchase and sale, as claimed by the plaintiff. When the defendant replied to plaintiff's first letter, it knew the number of car-loads of cooperage that plaintiff desired to purchase, and knew exactly of what materials the plaintiff was asking prices. It said, in effect: We will furnish you the car-load of 23½" heading at 13 cents, and we will furnish you a car-load of No. 2, 19½", at 7½ cents; or we will furnish you a car-load of No. 1 at 8½ cents, delivered at South Omaha. Upon the receipt of that letter, the plaintiff answered by its letter of February 13, 1907, in substance: All right, your proposition is accepted. We will take the car-load of 23½" at 13 cents, and the car-load of 19½" at 8½ cents, shipment to be made in 30 days. It thus appears that a specific unqualified offer to plaintiff was distinctly and unqualifiedly accepted.

In *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, it was said: "In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attend

Miller v. Hanna.

ing its execution, and will consider the relations of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties, and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view."

Applying that rule to this case, it seems clear that the plaintiff inquired of the defendant at what price it would furnish two car-loads of cooperage. The defendant by letter, in no uncertain terms, gave the plaintiff the information desired, and offered to sell to the plaintiff the cooperage it desired to purchase at prices definitely fixed by its letter. This offer the plaintiff unqualifiedly accepted, and it seems clear that the letters set out, aided by proper averments, were sufficient to constitute a contract of purchase and sale, as claimed by the plaintiff. The petition properly alleged the breach of this contract, stated the amount of the damages by reason thereof, and concluded with a suitable prayer for judgment. In short, it was not vulnerable to a general demurrer.

The judgment of the district court was clearly right, and is therefore

AFFIRMED.

Root, J., not sitting.

IRA MILLER, ADMINISTRATOR, APPELLEE, V. THOMAS W. HANNA, APPELLANT.

FILED MAY 6, 1911. No. 16,442.

1. **Descent and Distribution: CURTESY: LIABILITY OF LAND FOR DEBTS.**
By the provisions of section 29, ch. 23, Comp. St. 1887, the lands of which a married woman died seized descended to her surviving husband as a tenant by curtesy subject to sale for the payment of her debts.

2. **Executors and Administrators: SALE OF LAND TO PAY DEBTS.** The proceeding to sell the land of a deceased person for the payment of his debts as provided by sec. 67 *et seq.*, ch. 23, Comp. St. 1909, is special and partakes of the nature of a proceeding *in rem*.
3. ———: ———. Where it is made to appear to the judge of the district court that the order authorizing the sale does not comply with the provisions of the statute, and is void for any reason, it is his duty to refuse to confirm the sale made thereunder.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

F. A. Boehmer and I. P. Hewitt, for appellant.

Burkett, Wilson & Brown, contra.

BARNES, J.

This is an appeal from an order of the district court for Lancaster county confirming an administrator's sale of the interest of a remainderman in 160 acres of land situated in Dawson county.

It appears that in the month of April, 1907, one Jennie E. Miller departed this life in Lancaster county, Nebraska, intestate and without issue, leaving surviving her a husband and her father, one Thomas W. Hanna. Deceased left no debts, except the expenses incurred during her last illness and for her burial. At the time of her death she was the owner in fee in her own right of 160 acres of land situated in Dawson county, Nebraska. On the 5th day of December, 1907, Ira Miller, who was her husband, was by the order of the county court of Lancaster county appointed administrator of her estate. Subsequent to his appointment he procured an order of the county court allowing him \$597 as a claim against the estate of his deceased wife on account of the debts above mentioned. On the 3d day of August, 1908, the administrator commenced an action in the district court for Lancaster county to obtain a license to sell the Dawson county land for the payment of his claim against the estate of his de-

ceased wife. An order for the sale of the land in question was made, by which it was provided that it should be sold subject to the life estate of the surviving husband. The land was advertised for sale, and the interest in remainder of the father of the deceased was offered for sale and sold for the sum of \$600. When application was made to confirm the sale, appellant, who had no notice of the proceeding until after the order of sale was made, filed objections, which were overruled, the sale was confirmed, and he presents the record to this court for a reversal of the order of confirmation.

Appellant's first contention is that the husband is primarily liable for the expenses of the last illness and burial of his wife, and, until an execution against him is returned unsatisfied, no claim of that nature can be allowed against her estate. That question seems to have been foreclosed by the order of the county court. That court has original jurisdiction in the matter of the settlement and allowance of claims against the estates of deceased persons; and, where no appeal is taken from the order of that court, such order is, ordinarily, binding and conclusive upon all persons interested in the estate, and cannot be collaterally attacked.

It is next contended that the estate which the appellee took in the land belonging to his wife at the time of her death is liable for her debts, and that the order of the district judge for the sale of her land, subject to the life estate of the husband, for the payment of her debts is void, and may be attacked on a motion to confirm the sale, and therefore the order of confirmation should be reversed. On the other hand, it is contended that the appellee took an estate by curtesy in the lands of which his wife was seized at the time of her death which is not liable for her debts. Considering this to have been the rule at the common law, it seems clear that this rule has been greatly modified by our statutes. Section 1, ch. 53, Comp. St. 1909, provides: "The property, real and personal, which any woman in this state may own at the time of her mar-

riage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts." The statute in force at the time of the death of the intestate provides that, when any married women, seized in her own right of any estate of inheritance in lands, shall die leaving no issue, the lands shall descend to her surviving husband during his natural lifetime as tenant by curtesy, and, after his decease, to her father. Section 30, ch. 23, Comp. St. 1887, by which this proceeding is to be governed, provides, among other things: "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following."

Under statutes very similar in their provisions to the sections of our law above quoted, the courts of several of our sister states have held that the estate which the husband takes in the lands of the wife at the time of her death is subject to her debts. *Arrowsmith v. Arrowsmith*, 8 Hun (N. Y.) 606, was a case where all the land of the wife was sold to pay her debts. The court there said: "The respondent (meaning the husband), however, took such estate subject to the payment of the debts of his wife. During her life the property was absolutely hers, and she was entitled to receive the rents and profits thereof to her own use, and all debts by her contracted became a charge upon her property, as much as if she had been in fact an unmarried woman." In *Bennett v. Camp*, 54 Vt. 36, the court said: "But the right to occupy as tenant by the curtesy, like inheritance by an heir in real estate, is subject to be defeated to the whole or a part of the estate, by the necessity of a sale of so much as may be

required to pay the debts and expenses of administration, which cannot be discharged from the personal estate of the intestate." It appears that Mississippi had a statute, prior to the abolition of dower and curtesy in that state, that provided for an estate as a tenant by curtesy in all lands of which a married woman should die seized or possessed, and the supreme court of that state in *Stewart v. Ross*, 50 Miss. 776, said: "The right of the husband * * * becomes vested when the wife dies seized. It is subject to be defeated by the joint conveyance of husband and wife, by sale under legal process for the wife's debts, and, lastly, by a last will disposing of the estate as allowed by the statute of 1867. Curtesy attaches, under the statute, to all lands not conveyed by the husband and wife, not sold for her debts, nor devised by last will, or, in the words of the statute, to the lands of which she died seized."

Considering the provisions of our statutes in the light of the foregoing decisions, we conclude that the estate which descended to the appellee at the time of the death of his wife is liable for her debts, and that he took only a life estate in the residue of her lands which would remain after the payment of the debts and expenses which have been allowed against her estate. It follows that the judge of the district court had no power to make the order complained of, because the effect of that order was to deprive the remainderman of all interest in the estate, and declare that the life estate of the husband was not subject to the payment of the debts of his deceased wife.

It is contended, however, that the validity of the order cannot be questioned on the motion to confirm the sale, and if the sale was regularly conducted the court could not refuse the order of confirmation. We do not so understand this question. The proceeding to sell the land of a deceased person for the payment of his debts is a special one, and jurisdiction to make the order is conferred by statute upon the district judge in contradistinction from the district court. The statutes provide that upon the

filing of a petition by the administrator for a license to sell real estate for the purpose of paying the debts of a deceased person, the judge of the district court shall make an order directing all persons interested in the estate to appear before him at a time and place therein to be specified, not less than six weeks and not more than ten weeks from the time of making such order, and show cause why a license should not be granted. It is further provided that the judge of the district court at the time and place appointed in such order, or at such other time as the hearing shall be adjourned to, upon proof of due service, or publication of a copy of the order, or upon filing consent in writing to such sale by all persons interested, shall proceed to the hearing of the petition, and, if consent is not filed, shall hear and examine the allegations and proofs of the petitioner and all persons interested in the estate; that, if it shall appear that it is necessary to sell a part of the real estate, etc., the court may authorize the sale; that the administrator shall give bond to the judge of the district court, and that the judge of the district court may require a further bond from the executor or administrator when he shall deem it necessary. Finally, it is provided that the executor or administrator making any such sale shall make a return of his proceedings to the judge of the district court granting the sale. If it shall appear to the district judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property, etc., he shall make an order confirming the sale. It thus appears that, from the time the petition is filed to the final confirmation of the sale, the whole transaction partakes of the nature of a proceeding *in rem*, and so long as anything remains to be done by the judge of the district court, upon whom special jurisdiction to conduct the proceeding is conferred, he has full power to make any proper or necessary order therein, and if he discovers that a mistake has been made, and that his order does not accord with the authority conferred upon him by statute, he may

Drainage District v. Bowker.

correct the proceedings, and until such correction is made he should refuse to confirm the sale. *Prudential Real Estate Co. v. Hall*, 79 Neb. 808.

In this case it appears that the interest of the remainderman in the entire 160 acres of land was extinguished for a sum insufficient to pay the claim in question and the costs of conducting the suit. The property, as it was exposed for sale under the order complained of, could not have been expected to bring an amount at all commensurate with its value, and the sale, as conducted, amounts to a fraud upon the rights of the remainderman. The order of the district judge should have directed the administrator to sell the land in question, or so much thereof as should be found necessary to pay the administrator's claim, and a sale so conducted would, under present values, have taken only a small portion of the quarter section, leaving the life estate of the husband and the estate in remainder of the father of the decedent as to the remainder of the land intact for the benefit of both of them. We are therefore of opinion that the judge of the district court should have refused to confirm the sale in question.

The order of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

DRAINAGE DISTRICT NO. 1, RICHARDSON COUNTY, APPELLANT, v. THOMAS G. BOWKER, APPELLEE.

FILED MAY 6, 1911. No. 16,444.

1. **Drainage Districts: ASSESSMENT OF BENEFITS: APPEAL: BURDEN OF PROOF.** On the trial of an appeal from the findings and order of the board of a drainage district, organized under the provisions of chapter 161, laws 1905, assessing benefits to land situated within such district, it is not reversible error to instruct the jury that the burden of proof is on the district to show that the lands assessed will be benefited by the construction of the drainage improvement.

Drainage District v. Bowker.

2. ———: ———: ———: QUESTION FOR JURY. Under the provisions of that chapter as it stood prior to the amendments of 1909, (laws 1909, ch. 147), it was not reversible error to submit the question of the amount of such benefits to a jury.
3. Evidence examined, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Kelligar & Ferneau, A. R. Scott, E. Falloon and A. R. Keim, for appellant.

Reavis & Reavis, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Richardson county in the matter of the assessment of the lands of one Thomas G. Bowker for the benefits accruing thereto by a system of drainage established and constructed by drainage district No. 1 of that county. It appears that Bowker is the owner of 1,070 acres of land situated within the drainage district, and that he filed his objections to the assessments in question before the drainage board, which were overruled, and he thereupon perfected an appeal to the district court, where the cause was tried to a jury, a verdict was returned by which his assessment was reduced to some extent, and the amount thereof was fixed at the sum of \$6,599.44. Judgment was rendered on the verdict, and, as above stated, the drainage district has appealed.

The appellant presents, and has argued, the following assignments of error: First. The court erred in giving instruction numbered 1, requested by the appellee, thereby placing the burden of proof upon the drainage district. Second. The court erred in submitting the question of the amount of the assessments to the jury. Third. The court erred in holding that there was any competent evidence to submit to a jury upon which they could reduce or change the assessment made by the drainage board.

Drainage District v. Bowker.

These assignments will be disposed of in the order in which they have been presented.

1. The instruction complained of reads as follows: "You are instructed that, before you can find a verdict in favor of the drainage district, you must first find that the land of Mr. Bowker will in fact be benefited by the construction of the proposed drainage improvement. The question as to whether or not said land would be benefited is a question of fact for you alone to decide. The court has no right to pass on that question. The burden of proving that this land will be in fact benefited by the construction of such drainage improvement is upon the drainage district and, if they have not so proved by a preponderance of the evidence, you should return a verdict in favor of Mr. Bowker."

Upon the appeal of a landowner from the findings and order of assessment made by the drainage board, the question of the amount of benefits to his land can always be tried, and this was the question that was tried by the district court in this case. Section 17 of the drainage act (laws 1905, ch. 161) provides that the bond upon appeal to the district court shall be conditioned "the same as in appeals to the district court from civil actions in justice's court in this state." The secretary of the drainage board files a transcript and the papers in the district court, and that court thereupon has jurisdiction. The statute then provides that the appeal shall be docketed and filed as in appeals in other civil actions to said court. It is further provided that the procedure in the district court shall be the same as in matters appealed from the board of county commissioners. To illustrate: When a claim is filed against the county and is allowed by the county commissioners, and an appeal is taken to the district court, the question in that court is whether the claimant is entitled to recover anything against the county, and, if so, how much? He is the plaintiff, and must file a petition, and in the first instance prove his claim. This is true whether the claimant appeals or whether a taxpayer appeals from an

Drainage District v. Bowker.

allowance of the claim. In either case the claimant must file his petition and prove his claim, and this is so in cases like the one at bar. If the assessment against the land is unsatisfactory, and an appeal is taken to the district court, the procedure thereon is, by express provision of the statute, the same as the procedure in cases appealed from the county board. This provision is reasonable and logical. The drainage district in such case is the moving party. It asserts that the landowner should pay a certain amount of money toward the improvement, and alleges that this is because his land is benefited in at least that amount by the improvement. The drainage district has the affirmative side of the proposition, and should first present its evidence in order to maintain its position. No doubt the report of the engineer when approved and confirmed by the drainage board is *prima facie* evidence of the matters therein required to be stated, but this fact does not change the burden of proof. If the drainage district has the burden, it can use the engineer's report, if so confirmed and approved in the first instance, as evidence to sustain that burden. However, when the evidence is all before the court and jury, it is proper to tell them that the burden of proof as to the amount of benefits to the land of the defendant (for the landowner is virtually a defendant) is upon the drainage district. Such, in effect, was the instruction complained of, and it seems clear that the drainage district was not prejudiced thereby, because the jury found that Bowker's lands were, as a matter of fact benefited by the drainage improvement; and, having so found, it follows that, even if the instruction was not technically correct, the error, if any, was without prejudice.

2. Considering appellant's second contention, that the court erred in submitting the amount of the assessments to the jury, we find from the record that no objection was made to the impaneling of the jury, but thereafter, and when evidence was first offered, objection was made that "the case now called for hearing, is not a case contemplated by the drainage law or the

Drainage District v. Bowker.

statute of Nebraska as an action to be determined by a jury. It is a case that should be submitted to the court only." The objection was overruled, and an exception was noted. It appears that the trial of this case was conducted under the provisions of the drainage act of 1905, and before the amendments of 1909 took effect. By section 17 of the original act as found in chapter 161, laws 1905, relating to appeals in such cases, it is provided that, upon the filing of the transcript and a bond in the district court, that court has jurisdiction of the cause, which shall be docketed and filed as appeals in other cases to said court, "provided on appeal the procedure shall be the same as in matters appealed from the board of county commissioners." This provision seems to be broad enough to authorize the district court to submit the question of the amount of benefits to a jury, and to so hold in no way conflicts with our own opinion in *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, for what was there said was based on a construction of the law as amended by the act of 1909.

Again, we are of opinion that the objection to a jury trial was not seasonably made. If a party desires to object to a trial by jury, he should do so before the jury is impaneled; an objection made thereafter to the introduction of evidence should be considered as of no avail.

3. In disposing of appellant's third contention, to wit. that there was no competent evidence to submit to the jury, and upon which they could reduce or change the assessment made by the drainage board, we have examined the bill of exceptions, and find therein the testimony of a large number of witnesses showing, or tending to show, that the assessments for benefits upon the several subdivisions of Mr. Bowker's land was too high. Upon this point the evidence is conflicting. It seems that the jury has fairly solved that question. At any rate we are unable to say that the verdict is not sustained by the evidence.

Gallatin v. Tri-State Land Co.

Finally, the case seems to have been fairly tried, and the result appears to be just as between the parties.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

**SOLOMON S. GALLATIN, APPELLEE, V. TRI-STATE LAND
COMPANY, APPELLANT.**

FILED MAY 6, 1911. No. 17,028.

1. **Taxation: SALE FOR TAXES.** A county treasurer must make return of his public sales of real estate for taxes to the county clerk, as provided by section 205, art. I, ch. 77, Comp. St. 1903, before he is authorized to sell lands at private tax sale.
2. ———: ———: **NOTICE.** The treasurer's notice of tax sales must contain substantially all of the matters specified in the statute. If it omits the statement that so much of each tract as may be necessary will be sold for the taxes, interest and costs thereon, or if the amount of the taxes against each tract are incorrectly stated, the sale made pursuant to such defective notice will be invalid.
3. ———: ———: **TAX DEED: CONCLUSIVENESS.** Section 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) will not be construed to mean that a tax deed shall be conclusive evidence of all matters not recited in that section; and, where sufficient competent evidence is produced to overcome the presumptions created by the tax deed, it may be declared void.

**APPEAL from the district court for Scott's Bluff county:
HANSON M. GRIMES, JUDGE. Affirmed.**

Wright, Duffie & Wright, for appellant.

Morrow & Morrow, contra.

BARNES, J.

Action to set aside a tax deed and redeem the land described therein from the lien for taxes. The plaintiff had the judgment, and the defendant has appealed.

From the printed abstract and the agreed statements contained therein, it appears that the plaintiff is now and ever since the 27th day of August, 1898, has been the owner in fee of the northwest quarter of section 29, township 23, range 55, in Scott's Bluff county, Nebraska; that on the 7th day of December, 1903, the treasurer of that county sold said land at private sale for the delinquent taxes for the years 1901 and 1902 to one Vesta Funkhouser for the sum of \$18.55, and delivered to her a certificate of purchase therefor; that on the 8th day of December, 1905, the treasurer of Scott's Bluff county executed and delivered a tax deed to said Vesta Funkhouser, whereby he purported to convey said lands to her, the tax deed being based on the sale above mentioned; that thereafter Vesta Funkhouser executed and delivered a deed conveying said premises, and all the interest which she had acquired therein by virtue of her tax deed, to one Mattie Frank; that on or about the 13th day of October, 1906, Mattie Frank and her husband, William Frank, conveyed the land in question to the defendant, the Tri-State Land Company, together with all the interest which they or each of them acquired in and to the premises by virtue of the conveyance of Vesta Funkhouser.

Upon the trial of the issues joined, the district court for Scott's Bluff county found, among others, the following facts: That on or before the first Monday of December, 1903, and before selling the land in question at private sale, the county treasurer of Scott's Bluff county filed in the office of the county clerk of said county a return of the public sale of lands for delinquent taxes as the same appeared on the treasurer's sale book. To this finding the plaintiff excepted. That the county treasurer did not make any return of the duplicate certificate of the sale of said land to the county clerk of said county, nor did he file a duplicate certificate thereof with the county clerk, nor was any duplicate certificate of said sale filed in the office of the county clerk of said county at any time prior to the execution of said tax deed. To this finding the defendant excepted.

The board of county commissioners did not designate any paper for the publication of the delinquent tax list for the year 1903, but said board of county commissioners did designate the Mitchell Index as the official paper of said county, in which the treasurer caused the delinquent tax list for that year to be published, together with a notice that the lands described in said list would be offered for sale for the taxes due and delinquent thereon; that said notice was defective and irregular as to the land of the plaintiff in this, that it did not state the amount of delinquent taxes assessed against said land, the amount stated in the notice being \$8.88, whereas the true and correct amount of taxes against said land was \$18.05, and that it did not appear that the county treasurer's name or signature was subjoined to the list of lands published, but his name or signature was subjoined to the notice of sale, and the list of lands immediately following his name or signature; nor did the published notice show any amount due for interest thereon. To this finding the defendant excepted.

That the treasurer did not post, or cause to be posted, in any place in his office a copy of the list of lands to be sold in the year 1903 for delinquent taxes, nor a copy of the notice of sale thereof, and no copy of said list or notice was at any time posted in the office of the county treasurer of said county, and no list whatsoever of lands sold for delinquent taxes for the year 1903, or notice of lands for sale, was ever posted in any place in the office of the county treasurer. To this finding the defendant excepted.

That the alleged notice of expiration of the time for the redemption from sale which was given by publication only, was defective, in that it failed to state that the purchaser would apply for a deed for said premises.

The court further found, as a conclusion of law, that the sale of the land in question to Vesta Funkhouser for the taxes due and delinquent thereon was void; that the deed issued thereon to her was illegal and void and con-

veyed no title to her; that her grantors acquired no title to said premises by virtue of said tax sale and deed; that defendant has no title to said premises, but has a lien thereon for the amount paid by it and its grantors in purchasing said lands at tax sale, together with all subsequent taxes paid by them, with interest, penalties and costs paid thereon. Thereupon the court entered the decree complained of, and taxed the costs to the defendant.

An examination of the testimony contained in the printed abstract leads us to the conclusion that the findings of the district court are correct, with the exception of the one relating to the filing of the return of the public sale conducted by the treasurer for the delinquent taxes for the year 1903, and upon this point we find that there is no competent evidence in the record showing, or tending to show, that the county treasurer of Scott's Bluff county filed a return of the public sale of lands for delinquent taxes for the year 1903 in the office of the county clerk of said county at any time before the land in question was sold at private sale to Vesta Funkhouser.

It is the defendant's contention that the treasurer's tax deed in question, by the provisions of section 221, art. I, ch. 77, Comp. St. 1903, is conclusive evidence that all of the provisions of the statute and all prerequisites of the law were complied with by the taxing officers and the county treasurer up to and including the issuance thereof, and that by the execution and delivery of the tax deed to its grantor and the mesne conveyances above mentioned it obtained and has a perfect title in fee to the lands described therein, which the plaintiff cannot successfully assail. In this we think the defendant is mistaken. That question was recently before this court in *Tate v. Biggs*, *ante*, p. 195, where it was held that section 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) will not be construed to mean that a tax deed shall be conclusive evidence of all matters not recited in that section. We think this case is ruled by that decision, and further comment upon this point is unnecessary, and it is enough

Miller v. Miller.

to say that, when sufficient competent evidence is produced to overcome the presumption raised by the deed, it may be declared void.

Finally, it has been frequently held that the notice of tax sale must contain substantially all of the matters specified in the statute; that if it omits the statement that so much of each tract as may be necessary will be sold for the taxes, interest and costs thereon, and that it will be sold by the treasurer at public auction on the first Monday of November next thereafter, a sale made pursuant thereto will be void.

It appears that the notice in this case was not only defective and irregular in this respect, but it also failed to correctly state the amount of taxes due upon the land in question. Neither was there any published notice showing the amount of interest due thereon. This, together with the fact that the treasurer failed to make return of his public sales for the year 1903 to the county clerk before selling the plaintiff's land at private sale, are a sufficient departure from the provisions of the statute governing tax sales as to render such sale void. Therefore, a tax deed based on such a sale is also void.

For the foregoing reasons, we are of opinion that the judgment of the district court was right and should be affirmed, and it is so ordered.

AFFIRMED.

FELLEY M. MILLER, APPELLEE, V. ANNA M. MILLER,
APPELLANT.

FILED MAY 6, 1911. No. 16,434.

1. **DIVORCE: EXTREME CRUELTY.** "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." *Myers v. Myers*, 88 Neb. 656.

2. ———: ———. The mere fact that a husband and wife are living

Miller v. Miller.

apart when false charges of adultery are wantonly made by one spouse against the other does not of itself prevent such charges from constituting extreme cruelty.

3. ———: ———. The fact of separation is relevant and important only as it may aid in determining the question whether such charges caused great mental suffering on the part of the spouse wantonly and falsely accused.

APPEAL from the district court for Deuel county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland and *George A. Magney*, for appellant.

Wilcox & Halligan, contra.

LETTON, J.

The plaintiff began this action in the district court for Deuel county on March 5, 1908. In the petition he sets up certain specific acts which he alleges constitute extreme cruelty on the part of defendant. On the 31st of July an amended petition, omitting the former allegations as to cruelty, was filed, alleging extreme cruelty on the part of the defendant by the writing of a letter to him about September 9, 1907, containing certain false and foul charges against him of adultery and unnatural crimes, of such a nature that they caused him great humiliation and mental anguish, and further charging that on or about July 8, 1908, she wrongfully and falsely made similar charges to certain acquaintances of plaintiff; that all of such charges were false and untrue, and caused him great shame, humiliation, and disgrace, as well as mental anguish and suffering. The defense amounts practically to a general denial, with a plea that the plaintiff is not a resident of Deuel county, and that his residence is in Douglas county.

The plaintiff is a railway mail clerk. He, together with his wife and a grown daughter by a former wife, resided in Omaha until July, 1905, at which time he filed a peti-

tion in the district court for Douglas county, praying for a divorce from the defendant on the ground of extreme cruelty. He left defendant on that day and has resided apart from her ever since. An answer was filed, praying that the divorce be denied and for a decree of separate maintenance and support. After the testimony was introduced, the plaintiff dismissed the action without prejudice, but the court gave defendant a judgment for support in the sum of \$25 a month.

1. About the time the first action for divorce was brought, the plaintiff obtained permission from the post office department to remove his residence from Douglas county to Deuel county, where his brother lives. Plaintiff's run extends from Omaha to Cheyenne. He works six days and rests for the next seven days. He rents a room in each of these cities to occupy while taking his regular runs, but spends the time between runs at his brother's home in Deuel county. His daughter also makes her home there during her vacations, but attends school at North Platte while school is in session. Plaintiff has never voted in Deuel county, but has served as a juror there, and he has not voted in Douglas county since he moved. We feel satisfied that he is a *bona fide* resident of Deuel county and entitled to maintain this action in the district court for that county.

2. It is unnecessary in the consideration of this case to relate the acts and doings of the defendant which are relied upon to sustain the decree of divorce. We are satisfied that they would be sufficient to constitute extreme cruelty on the part of a wife toward a husband if they were living together at the time of their commission. The parties, however, at this time were living apart, and the question is presented whether such acts constitute a sufficient foundation for a decree of divorce under such circumstances, and when a decree for separate maintenance is in force against the husband. The actions of defendant and the charges made by her, as testified to by the three witnesses called by the plaintiff, were clearly of a nature

such as to bring him into public disgrace and ignominy. A person of whom such words were spoken must necessarily suffer extreme shame, humiliation, and anguish of mind. The plaintiff testifies that he was thereby compelled to shun the busy streets, to keep away from his friends and acquaintances, and that he suffered extreme shame, humiliation, and mental agony.

An unfounded and malicious accusation of infidelity, when made by the husband against the wife, is usually held to constitute such extreme cruelty as to warrant a divorce. *Walton v. Walton*, 57 Neb. 102; *Ellison v. Ellison*, 65 Neb. 412. Cases holding the converse of this doctrine are not so common, but, upon principle, where the accusations are of the gross and vile nature of those made by the defendant in this case, are wantonly and falsely made, and where they have the result testified to by the plaintiff, we see no reason why the sex of the injured party should change the rule. Perhaps where a charge of adultery is made by the wife, the tougher fibre of the male makes him better able to sustain the charge with equanimity than one of the gentler sex under a like accusation, and, hence, few cases are to be found where such an accusation made against the husband, standing alone, is held to be extreme cruelty. But, where the charge is bestiality and unnatural crime, and the result of the accusation is shown to be as destructive of the purpose of the marriage relation as that of a false charge of adultery against a wife, the matter of sex alone should make no difference in the legal effect. *MacDonald v. MacDonald*, 155 Cal. 665; *Myers v. Myers*, 88 Neb. 656.

Upon the question of the effect of the separation upon the right of the husband to a divorce for extreme cruelty consisting of false and scandalous charges, we are of the same opinion as that expressed by the supreme court of California in *MacDonald v. MacDonald*, *supra*, which is, substantially, that the mere fact that the parties are living apart when false charges are maliciously made by one spouse against the other does not necessarily prevent

such charges constituting extreme cruelty. It is relevant and important only as it may aid in determining the question whether such charges inflicted grievous mental suffering upon the injured party. See, also, 1 Bishop, Marriage, Divorce, and Separation, secs. 1282, 1300, 1302, 1306; 1 Nelson, Divorce and Separation, p. 306. While the words and acts of the defendant perhaps were not so aggravating and unbearable as they would have been if the parties had been living together, yet the very fact that it is the wife who makes such charges against the husband must inevitably tend to render them more credible than if made by a stranger. We cannot see that the fact that the marriage bond has been weakened to a certain extent can or should operate to take away the sting and venom of false charges, or render that innocuous which under other circumstances would constitute such extreme cruelty as is recognized by the law as a just and proper ground for the entire dissolution of the marriage tie. The effect upon the plaintiff's peace of mind would be equally great in the one case as in the other.

We are disposed to view with charity some of the actions of the defendant in this case on account of her time of life, but under all the evidence we think the decree of the district court was justified. It is therefore

AFFIRMED.

FAWCETT, J., concurs in the conclusion.

**ANNIE E. HOWELL, APPELLEE, v. ERASTUS L. HOWELL,
APPELLANT.**

FILED MAY 6, 1911. No. 16,436.

1. Divorce: DECREE: OPENING DURING TERM. A decree rendered in a divorce case is usually within the control of the district court during the term at which it is rendered. If the court believes it necessary in the interest of justice to open it up and allow

Howell v. Howell.

further evidence to be taken at the same term, the matter is entirely within its discretion, and, unless an abuse of this discretion has been shown, this court will not interfere with it.

2. Evidence examined, and *held* not to support the findings and decree.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed and dismissed.*

F. W. Fitch, for appellant.

Weaver & Giller, contra.

LETTON, J.

This is an appeal from a decree of divorce granted by the district court for Douglas county. The petition charges habitual drunkenness on the part of defendant, and also cruelty and inhuman treatment. The case was called for trial on the 25th of May, 1909, and the evidence on behalf of plaintiff taken. At the conclusion of plaintiff's case defendant moved to dismiss, whereupon the court found against the plaintiff and dismissed the cause. Three days later, and at the same term of court, plaintiff filed a motion asking that the decree be vacated and set aside, and to be permitted to introduce further proof, on the ground of newly discovered evidence. On the 12th day of June the court set aside the decree. Testimony was then taken, the matter taken under advisement, and at a later day in the same term the court found that the plaintiff was entitled to a decree of divorce on the ground of extreme cruelty. The appellant makes two contentions: First, that the district court had no jurisdiction to enter the decree; and, second, that the decree is not sustained by the evidence.

As to the jurisdiction of the court to set aside the decree and open the case for further testimony, this was entirely within the discretion of the court, and, unless an abuse of its discretion has been shown, we cannot interfere with it. This court has been very liberal in holding that decrees of the district court are largely within its control during the term at which rendered. If the court

believes it necessary in the interests of justice to open up a decree in a divorce action at the same term and allow further evidence to be taken, it has that power. While this is a power that ought not to be lightly exercised, still, unless substantial injury to the rights of the complaining party has been shown, the final judgment will not be interfered with.

Defendant is charged in the petition with drunkenness, but the evidence totally fails to sustain this charge. He seems to have been intoxicated but once during all the years of their marriage. It is undisputed that he was a constant drinker of liquor, amounting, as the plaintiff testifies, to about a quart of whiskey in a week or ten days, but it is shown that it had been recommended by a physician, that both husband and wife believed that it was necessary for his health, and that she herself procured much of the whiskey for him under that impression.

The evidence as to the charges of cruelty adduced before the first judgment was rendered was also insufficient, and this judgment was clearly right, as the evidence then stood. The parties were married on October 7, 1888, at Norton, Kansas. At that time plaintiff was 18 years of age and the defendant was 37. From there they moved to Nebraska City, and later to South Omaha, where they went into the dairy business, at first leasing, and afterwards purchasing, a small tract of land for that purpose. When they first came to South Omaha, which was in 1900, they had two children, the older boy being 9 years old, and the younger son 6. The plaintiff appears to have been a strong and healthy woman, while the defendant was somewhat frail and of a nervous temperament. The proof shows that the wife was much the more energetic and efficient in the work connected with the dairy; that the greater part of the labor both in the house and connected with the business fell upon her shoulders, while the defendant took life more easily. Plaintiff complains very bitterly that she was compelled to do the heavy work about the place, milk the cows in winter and summer.

Howell v. Howell.

clean out the stable, and take care of the children, while defendant, as she testifies, remained in bed until she had the work done, when he would arise, eat his breakfast, and go out with the wagon to deliver the milk to the customers. She testifies that he compelled her to do this work; but we are satisfied that there was no actual compulsion about it, more than that she, and he also for that matter, believed that it was necessary the work should be done, and that he was physically unable to do it. They afterwards sold the dairy and divided the proceeds; plaintiff taking a rooming house in Omaha, and defendant going out as an agent or salesman. He returned and wanted to live with her again, but she refused to have anything to do with him, and seeks in this action to restrain him from molesting her.

The real question in this case is whether the additional evidence produced after the judgment was opened was sufficient, when taken in connection with that previously adduced, to warrant a finding that the charges in the petition had been sustained. This evidence is, in substance, that he was guilty of compelling her to submit to excessive sexual intercourse under conditions which were injurious to her health, and which were degrading in their tendency. This testimony is flatly denied by the defendant, and does not seem to be corroborated, while other testimony seems to indicate in some degree another reason for plaintiff's desire to get rid of the defendant. The specific allegations of cruelty in the petition are meagre, though set forth in many words, and such as are set forth were not proved at the trial. The additional evidence does not support and is not responsive to the specific allegations of cruelty made by the petition, and when the incompetent and hearsay testimony is disregarded there is little evidence left applicable to any material allegation. Such being the case, the judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

SWAIN LARSON, APPELLEE, V. CHICAGO & NORTHWESTERN
RAILWAY COMPANY, APPELLANT.

FILED MAY 6, 1911. No. 16,424.

1. **Appeal: ADMISSION OF EVIDENCE.** "Error cannot be predicated on the admission of testimony identical with that already admitted without objection." *Robinson v. City of Omaha*, 84 Neb. 642.
2. ———: **INSTRUCTIONS: STATEMENT OF ISSUES: NECESSITY TO REQUEST INSTRUCTIONS.** It is the duty of the trial judge on his own motion to state to the jury the issues presented by the pleadings, and he should not hand the jury those documents with the statement that they constitute the issues; but if the substance of the issue is correctly stated in other instructions, and the defeated litigant does not present an instruction containing a more detailed statement, it is in no position to complain in this court that the issues were not sufficiently stated to the jury.
3. ———: ———: **HARMLESS ERROR.** A judgment should not be reversed because one clause in an instruction does not correctly state the law, unless it is evident that the error prejudiced the complaining party.
4. **Railroads: KILLING ANIMALS: FENCING RIGHT OF WAY.** If a railway company fails to erect and maintain a fence along its right of way as required by statute, and in consequence horses go upon the railway track and are killed by one of the company's locomotive engines, the mere fact that two miles distant from the point where they entered the right of way they escaped from their driver and ran away will not exonerate the company.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

B. T. White, C. C. Wright, B. H. Dunham and F. E. Bishop, for appellant.

R. M. Johnson and M. F. Harrington, contra.

ROOT, J.

This is an action to recover damages for the loss of two horses killed, as alleged, by reason of the defendant's failure to maintain a fence as required by section 1, art.

Larson v. Chicago & N. W. R. Co.

I, ch. 72, Comp. St. 1909. The plaintiff prevailed, and the defendant appeals.

The trial judge would have observed a more correct practice had he not delivered the pleadings to the jury with a written instruction that "these pleadings constitute the issues in this case"; and, if the jury had not been otherwise advised concerning the issues, we would not hesitate to reverse the judgment. The issues joined are simple, and were fairly stated in the second and fourth instructions, wherein the jury were told that the burden was upon the plaintiff to prove by a preponderance of the evidence that his horses were killed on the defendant's right of way by one of its locomotive engines, "and were enabled to get upon said railroad track by reason of the fence on the north side of defendant's track being out of repair"; but that, if the plaintiff's carelessness or negligence caused the horses to go upon the track, the defendant was not liable. Furthermore, in *Barney v. Pinkham*, 37 Neb. 664, and in *Sanford v. Craig*, 52 Neb. 483, we held that, if counsel desired a more detailed statement of the issues than appears in the court's charge, it is their duty to request an instruction conforming to their views. The defendant, so far as we are advised, made no requests for instructions, and its complaint is without merit. Of course, the inaction of counsel would not cure a misstatement of the issues, but no misstatement was made.

The defendant contends that instruction numbered 3 permitted the jury to return a verdict for the plaintiff if they found that the fence was out of repair, although it might have been amply sufficient to turn horses that were not running away. One clause of this instruction might be thus construed, but it should be read in connection with other parts of the instruction and with the other instructions given. In the same instruction the jury were told that if they found from the evidence that the fence at the point where the team entered the right of way "was an ordinarily well-built five-wire fence with posts one rod apart, and that at the time of the injury to the horses

said fence was in good repair, then the plaintiff cannot recover." They had also been informed that the statute required the defendant to erect and maintain "fences on each side of their railroad suitable and amply sufficient to prevent cattle and horses from getting on the track of said railroad." The statute so provides. Comp. St. 1909, ch. 72, art. I, sec. 1. If the testimony given by the plaintiff's witnesses is true, the fence at the point in question would not under ordinary circumstances repel horses; if the defendant's witnesses should be believed, the fence was amply sufficient for that purpose and was in perfect repair. The jury, in accepting the testimony adduced by the plaintiff, must necessarily have believed, not only that the fence was out of repair, but that it would not repel horses. Under these circumstances we do not think that there was prejudicial error in giving instruction numbered 3.

The horses commenced to run about two miles from the point where they were killed, but there is no direct evidence that they were running when they entered the right of way, although from whatever presumption may exist and the facts and circumstances shown by the evidence the jury might have so found. The defendant, however, did not request an instruction that it was not compelled to construct or maintain an impassable barrier to live stock, or one that would turn a runaway team; and, if the jury found that the fence was amply sufficient under ordinary circumstances to repel horses, their verdict should be for the defendant. Had a request of this character been made and the instruction refused, it is not improbable that the defendant would have had just cause for complaint. *Shellabarger v. Chicago, R. I. & P. R. Co.*, 66 Ia. 18. But if the fence, because of its construction or condition of repair, did not comply with the statute, the mere fact that the horses were running away at the time they entered the right of way would not exonerate the company. *Chicago & A. R. Co. v. Utley*, 38 Ill. 410. Taking the instructions together, we find no prejudicial

McManus v. Burrows.

misstatement of the law, and the defendant is in no condition to complain because the issues and its possible defense as developed by the evidence were not more sharply defined.

Witnesses testified to the condition of the fence at the point where the team entered the right of way and for a considerable distance therefrom. Some of this testimony went in without objection, and to some objections were made and overruled. Under these circumstances the defendant will not be heard to complain. *Robinson v. City of Omaha*, 84 Neb. 642.

Sufficient has been said to demonstrate that the evidence will sustain a finding that the defendant is liable. There is no complaint that the damages are excessive. Upon a consideration of the entire evidence, we find no error prejudicial to defendant, and the judgment of the district court is

AFFIRMED.

BARNES and FAWCETT, JJ., dissent.

**THOMAS WARD MCMANUS, EXECUTOR, APPELLANT, V.
CAMILLA S. W. BURROWS, APPELLEE.**

FILED MAY 6, 1911. No. 16,439.

Eminent Domain: CONDEMNATION MONEY: RIGHTS OF DEVISEE AND EXECUTOR. As between the devisee of real estate in Nebraska and an executor whose sole warrant of authority is his letters testamentary issued by a court of a sister state, there being no contention that unpaid claims exist against the estate or that the executor was in possession of the real estate, the devisee has the better right to condemnation money in the possession of the county judge.

**APPEAL from the district court for Colfax county:
CONRAD HOLLENBECK, JUDGE. Affirmed.**

W. M. Cain, for appellant.

A. M. Post, contra.

ROOT, J.

Camilla S. McManus, late of the state of Missouri, at the time of her decease testate, owned a quarter section of land in Colfax county. By the terms of Mrs. McManus' will, which has been admitted to probate in the courts of Nebraska and Missouri having jurisdiction of the subject matter, her entire estate is devised; one-sixth part to a granddaughter, one-half to a son, who is the executor of her will, and the residue to a trustee. Subsequent to Mrs. McManus' death a railway company condemned a right of way across the farm in Colfax county, and deposited with the county judge the amount of the award. The executor applied to the county judge for all of the money, but, upon the granddaughter's objections and application, the money was paid to the several devisees according to the terms of the will. The executor prosecuted error proceedings to the district court, and from a judgment affirming the order of the county judge an appeal is prosecuted to this court. Neither litigant questions the jurisdiction of the county judge to make the order, and this subject will not be discussed or decided.

There is nothing in the record to suggest that the estate is not solvent, nor that all of the claims against it have not been paid; there is nothing to advise us that the executor, at the time the land was condemned, or subsequently, had possession thereof; there is no contention that by the terms of the will Mrs. Burrows, the granddaughter and devisee, is not entitled to one-sixth part of the condemnation money, nor is there assertion or proof that the executor has received letters testamentary from any probate court in this state. The condemnation money stands in the place of the land. *Omaha Bridge & Terminal R. Co. v. Reed*, 69 Neb. 514. If the executor had been ap-

Gordon v. Hennings.

pointed by a county judge in this state, had not been directed by that court to take possession of his testatrix' real estate, and there were no unpaid claims against the estate, his right to the possession of the land or to the condemnation money would not be paramount to the rights of the devisees. *Tunnichliff v. Fox*, 68 Neb. 811; *Lewon v. Heath*, 53 Neb. 707. In the circumstances of this case, the devisee, and not the executor, is entitled to the money. *Buckner v. Charleston & S. R. Co.*, 7 S. Car. 325; *Hankins, Adm'r, v. Kimball*, 57 Ind. 42.

The judgment of the district court therefore is

AFFIRMED.

**WILLIAM A. GORDON, APPELLANT, V. AUGUST HENNINGS
ET AL., APPELLEES.**

FILED MAY 6, 1911. No. 16,443.

1. **Attorney and Client: ATTORNEY'S LIEN.** An attorney at law entitled to practice his profession in this state has a charging lien upon money in the hands of an adverse party in an action or proceeding.
2. ———: **AUTHORITY OF ATTORNEY: COLLECTION OF MONEY.** The attorney by virtue of his employment, and while that relation exists, has authority to collect and receive money due his client in an action or proceeding in which the attorney rightfully appears, but that authority ceases with the severance of the relation of attorney and client.
3. ———: **ATTORNEY'S LIEN: CITY WARRANTS.** If an attorney at law duly acquires possession of city warrants drawn to the order of his client, he has a charging lien thereon, as well as upon money appropriated by the city for their payment, to satisfy any balance due him from his client for legal services rendered in and about all transactions leading up to the execution of the warrants and for money expended by him for the benefit of his client in such litigation; but, if the attorney is discharged from his employment before the warrants are collected, and both the attorney and the city treasurer are notified of such discharge and the revocation of the attorney's authority to collect, the treasurer will pay at

Gordon v. Hennings.

his own risk and that of his bondsmen any money in excess of the balance actually due the attorney from his client for such services and money expended.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed.*

L. D. Holmes, for appellant.

M. L. Learned, A. G. Ellick, McGilton, Gaines & Smith, Crofoot & Scott and Stout & Rose, contra.

ROOT, J.

A history of the transaction out of which this litigation arises may be found in *Gordon v. City of Omaha*, 77 Neb. 556. That suit was prosecuted by the plaintiff herein against the city; the instant one is against the bondsmen of the late city treasurer. From a judgment rendered upon a directed verdict in the defendants' favor the plaintiff appeals.

The defendants justify the court's instruction on two grounds: First, the opinion in *Gordon v. City of Omaha, supra*; second, for the alleged reason that, until Judge Gordon shall have settled with his counsel Mr. Eller, this action cannot be maintained. *Gordon v. City of Omaha, supra*, holds that under the city charter notice to the treasurer that Eller had been discharged, and therefore was not authorized to collect the Gordon warrants, was not notice to the city. The opinion does not hold that, if Hennings with notice of these facts paid the money to Eller, he would not be liable to the plaintiff therefor. By executing the undertaking, the bondsmen agreed that their obligation should remain in force if the city treasurer did not faithfully discharge all of the duties of his office. The principal duty which the law casts upon the treasurer is to pay to the persons named in the warrants the funds in his hands appropriated for that purpose. Mr. Hennings did not pay the warrants to the person to whose order they were drawn, nor to the individual to

Gordon v. Hennings.

whom the claims had been assigned. Hennings paid the money by color of his office, and both he and his bondsmen became liable to the party injured thereby. *Turner, Frazer & Co. v. Killian*, 12 Neb. 580; *Barker v. Wheeler*, 71 Neb. 740. The first defense is not seriously insisted upon, and we are of opinion that it should fail.

As to the second defense, Judge Gordon and the plaintiff disclose in their testimony that Mr. Eller, while attorney for Judge Gordon, secured possession of the warrants, and subsequently refused to deliver them to either Gordon until he was paid a balance of \$1,400, which he asserted was due him for legal services rendered in the litigation which brought these warrants into existence. An inference may be drawn from this testimony that subsequently Mr. Eller was paid \$575 on this account, but, construing the testimony in the light most favorable to the defendants, Mr. Eller did not assert a charging lien in excess of \$1,400. The face of the warrants aggregated \$1,600. The testimony further discloses that Mr. Eller also claimed money for legal services rendered Judge Gordon in litigation not connected with the suits against the city or its officers over his right to the office of police judge or the amount of his salary, but this contention could not enlarge the attorney's charging lien, nor, since Judge Gordon's interest in the claim against the city had been assigned for a valuable consideration to his son before Mr. Eller secured possession of the warrants, could the attorney successfully assert a retaining lien upon those instruments to secure money due him for legal services in litigation in no manner connected with his client's claim to the office or to the salary. The evidence therefore was sufficient to sustain a finding that Mr. Eller had received from the city treasurer \$200, and possibly \$775, in excess of his charging lien. The defendants argue that, until Mr. Eller's lien shall have been discharged, no part of the warrants or the money paid upon them can be said to be the separate property of Judge Gordon or of his assignee, and cite *Van Etten v.*

Gordon v. Hennings.

State, 24 Neb. 734. In that case the attorney, while the relation of client and attorney existed, rightfully collected his client's money, and was entitled to a portion thereof for his services, and for these reasons it was held that he could not be convicted of embezzlement until his account with his client had been settled amicably or by an adjudication.

In the instant case Eller was not attorney for Judge Gordon when the money was collected, but had been discharged by his client and specifically instructed not to collect the warrants. Of course, this discharge did not dissolve the lien which the law gave Mr. Eller upon the money in the city's possession, nor destroy his equitable right to so much of the fund as might be necessary to satisfy that lien, but this fact withdrew the attorney's authority to collect the money over his client's objection. The city treasurer, with knowledge of the facts, assumed to judge between the contesting claims, paid the money to the individual to whom the warrants were not payable, and in defiance of a warning not to do so. In our judgment the city treasurer and his bondsmen became liable to respond to the plaintiff, should it subsequently appear that Mr. Eller had been overpaid.

Upon a future trial of the case, the evidence may prove an entirely different state of facts. This opinion is based upon the uncontradicted evidence adduced by the plaintiff, and should not be considered as foreclosing proof of any fact in issue in the case. The district court erred in sustaining the motion to direct a verdict, and its judgment therefore is reversed and the cause is remanded for further proceedings.

REVERSED.

HAMILTON COUNTY, APPELLEE, v. AURORA NATIONAL BANK,
APPELLANT.

FILED MAY 6, 1911. No. 16,609.

Judges: DISQUALIFICATION. An attorney, by presenting a question of law in the district court in one case at the time the identical question is submitted by other counsel in another not involving the first attorney's client; does not disqualify himself from sitting in the second case on appeal if he subsequently becomes a member of this court.

MOTION to vacate the judgment in this case reported in 88 Neb. 280. *Motion overruled.*

ROOT, J.

The appellee has filed a motion requesting the court to vacate the judgment of reversal, for the alleged reason that Judge SEDGWICK was not qualified to act as a judge in this case, and without his vote the judgment of the district court could not have been reversed.

Judges ROSE and SEDGWICK did not hear the oral arguments, because Judge ROSE, while deputy attorney general participated in an opinion to the state treasurer with respect to the subject matter of this litigation. Judge SEDGWICK, before his election, appeared as counsel for the county treasurer in the case of *Hamilton County v. Cunningham*, which was finally determined in 87 Neb. 650, and for that reason preferred not to sit in the instant case. The five judges before whom this case was argued were unable to agree upon the judgment, but divided three to two. Section 2, art. VI of the constitution, provides that a majority of the seven judges constituting the court shall be necessary to pronounce a decision. In this dilemma the five sitting members insisted that Judge SEDGWICK should take part in the decision, and he reluctantly consented. At that time the principal facts upon which the plaintiff predicates its contention that Judge SEDGWICK is disqualified had escaped his recollection, and were unknown to the

other members of the court. These facts are that in Mr. Cunningham's answer it was alleged as a separate defense that counsel for the plaintiff were not authorized to commence or prosecute the action. In the instant case the identical defense was raised by a plea before answer. The question of law, which was decided by Judge Corcoran adversely to the defendant, was preliminary and unimportant, and has not been passed upon by this court in either case. Since the question of law appeared in both cases, Judge SEDGWICK presented an argument in the interest of his client, although he had not been employed by and did not appear for either party in this suit. Until the motion was filed in this court, Judge SEDGWICK did not suspect that any person considered that he was attorney for any party to this suit.

The statute, section 37, ch. 19, Comp. St. 1909, provides: "A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party, or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, * * * or where he has been attorney for either party in the action or proceedings and such mutual consent must be in writing and made a part of the record."

No suggestion is made, nor is it a fact, that Judge SEDGWICK has the slightest interest in the event of this suit, nor is he related to any party thereto. At common law the fact that the judge had been counsel in the case before being elevated to the bench did not disqualify him. *Taylor v. Williams*, 26 Tex. 583. The statute has enlarged the law, but it should not be construed to cover cases not within its letter or reason. *Houston & T. C. R. Co. v. Ryan*, 44 Tex. 426; *McFaddin v. Preston*, 54 Tex. 403.

If Judge SEDGWICK had waited until his client's case was tried upon the merits before arguing the right of plaintiff's counsel to prosecute the action, it is not probable that they would now contend that by making the argument he became attorney for a party that had not employed him, for whom he did not appear, and with whom the relation of

Wilson v. State.

client and attorney did not exist. The fact that the district court in the interest of economy permitted indential questions of law arising in two distinct cases to be submitted at one hearing by counsel for the respective litigants cannot create a relation which never existed. We are satisfied that Judge SEDGWICK is not disqualified.

The writer of this opinion, speaking for himself only, adheres to the position taken by Judge BARNES in his dissenting opinion, and for the reasons therein set forth believes that a rehearing should be granted. But the motion to vacate the judgment because of the alleged disqualification of Judge SEDGWICK should be

OVERRULED.

ROSE and SEDGWICK, JJ., took no part in this decision.

O. F. WILSON V. STATE OF NEBRASKA.

FILED MAY 6, 1911. No. 16,897.

Physicians and Surgeons: LICENSES: INFORMATION. A statement in an information that the accused did treat and profess to heal a certain named patient, "without having a certificate or license issued by the state board of health, and filed in the office of the clerk of Custer county, Nebraska, as required by law," does not negative the fact that a license issued by the state board may have been filed in the office of the county clerk of the county where the accused resides.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. Reversed.

Silas A. Holcomb and Morris & Hartwell, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

Root, J.

The plaintiff in error prays for a reversal of a judgment of conviction on a charge of practicing medicine without a license.

The information charges that the accused, "late of the county aforesaid (Custer), on the 11th day of March, 1910, * * * then and there being in said county and state aforesaid, the said C. F. Wilson did then and there at the times herein set out unlawfully practice medicine and profess to heal, and did treat for physical ailment one Herman C. Olsen, without having a certificate or license issued by the state board of health, and filed in the office of the clerk of Custer county, Nebraska, as required by law." There is no allegation in the information that the accused resides in Custer county. The accused requested the district court to quash the information, for the alleged reason that it did not state facts sufficient to constitute the offense of unlawfully practicing medicine or of practicing medicine without a license, and did not state facts sufficient to constitute any offense under the laws of Nebraska. This motion was overruled, and the accused then entered his plea of not guilty.

Chapter 55, Comp. St. 1909, forbids the practice of medicine as therein defined, unless the practitioner shall have first procured from the state board of health a license, and shall have filed it in the office of the county clerk of the county wherein the licentiate resides or in the county in which he intends to practice. The prosecutor does not charge that a license was not issued, nor that a license was not filed in the county where the accused resides. Every fact stated in the information may be true, and the accused be not guilty. The subject is discussed in *Jones v. State*, 49 Neb. 609, wherein the court by Post, C. J., say, in substance, that the law is satisfied by registration in the county of the physician's residence, and that "it follows from such an interpretation that an indictment or information charging the practice by the accused of medicine, sur-

Aetna Indemnity Co. v. Malone.

gery, or obstetrics in a designated county, without having procured the registration therein of the statutory certificate, and without disclosing the county of his residence, would not state an offense under the statute cited." The defect is one of substance. The defendant at the first opportunity challenged the county attorney's attention to the fact, and has at all times preserved his right to raise the question in this court. In our opinion the information is fatally defective, and the motion to quash should have been sustained.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

**ÆTNA INDEMNITY COMPANY, APPELLEE, v. JAMES MALONE
ET AL., APPELLANTS.**

FILED MAY 6, 1911. No. 16,409.

1. **Trusts: CONSTRUCTIVE TRUSTS: STOLEN PROPERTY: JURISDICTION IN EQUITY.** In a suit to declare and enforce a constructive trust with respect to stolen property, fiduciary relations between the parties are not essential to the jurisdiction of a court of equity.
2. **Injunction: POLICE OFFICERS: MONEY TAKEN FROM BURGLARS.** A court of equity may enjoin a police officer from transferring a fund taken by him from burglars who procured it by robbing a bank, and may restore it to the owner thereof.
3. **Trusts: MONEY TAKEN FROM BURGLARS: EVIDENCE.** In a suit to trace a stolen fund through burglars to a police officer who took it from them when they were prisoners, the allegations of the petition may be established by a preponderance of the evidence.
4. **———: ———: ———.** Proof that a bank had been robbed of a certain sum of money, and that an identified silver dollar, taken by a police officer from burglars shortly after the bank had been robbed, their possession being unexplained, was a part of the money so stolen, when considered with surrounding circumstances, may sustain a finding that other money taken from the burglars at the same time and in the same manner was also a part of the money stolen from the bank.

Aetna Indemnity Co. v. Malone.

5. **Appeal: ADMISSION OF EVIDENCE.** The admission of incompetent evidence is not reversible error in a case tried to a court without a jury, where the judgment rendered is sustained by other evidence properly admitted.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

E. O. Strode and Greene & Greene, for appellants.

Burkett, Wilson & Brown, contra.

ROSE, J.

This is a suit to enjoin two police officers of the city of Lincoln from transferring money taken by them from burglars who procured it by robbing a bank, and to recover the fund thus taken on the ground that plaintiff had indemnified the bank against burglary, had paid the indemnity, and had succeeded to the rights of indemnitee. In addition to the police officers, the burglars were made defendants, and judgment against them for the full amount stolen was part of the relief demanded by plaintiff. In both particulars plaintiff prevailed, and defendants have appealed.

The petition states facts showing: Plaintiff is a Connecticut corporation duly authorized to indemnify banks against burglary and safe-blowing in Nebraska. For a number of years the Chapman State Bank has been transacting business under the laws of Nebraska, at Chapman, Merrick county. August 30, 1905, plaintiff indemnified the bank named against burglary. When the policy was in force November 27, 1905, burglars forcibly entered the bank, blew open a safe, and took \$2,475 in cash, whereby plaintiff became liable to the bank for \$2,000. The burglary was committed by defendants John Burke, Thomas Reiley and John Dorn, and they were arrested by police officers of Lincoln, December 2, 1905. While they were in custody defendant James Malone, city detective of Lincoln, and Philip H. Cooper, chief of police of Lincoln,

Aetna Indemnity Co. v. Malone.

took from Burke \$451.65, from Reiley \$752.97, from Dorn \$9.50. This money was taken from the bank when the burglary was committed, and is now in possession of Malone and Cooper. Afterward the prisoners were turned over to the sheriff of Merrick county. Later Burke and Reiley were convicted of the burglary and are serving terms in the penitentiary therefor. Plaintiff settled its liability for indemnity by paying the bank \$2,000, and, pursuant to the terms of the policy, took from the bank an assignment of its right to the money in the hands of the police officers and of its claim against the burglars, who are insolvent. Malone and Cooper refuse to turn over to plaintiff the money in their hands, and will transfer it to others unless restrained by the court. In answering the petition, Malone and Cooper pleaded they were notified that the prisoners had assigned to their attorneys the money in controversy, and that Malone is entitled to retain \$700 as an unpaid reward offered by plaintiff, if the money belongs to the latter. Defendants Burke and Reiley in their answer deny that plaintiff had authority to write indemnity against burglary in this state, deny that they took from the bank the money in controversy, and deny that it belonged to plaintiff by assignment or otherwise; but allege that the money was assigned to and is owned by their attorneys, and that it was not the sort of money or of the denominations lost by the bank at the time of the burglary. The reply to both answers was a general denial.

The first proposition argued by defendants relates to the nature of the case. Is it a suit in equity or an action at law? It was heard below without a jury, over the objection of defendants, and this is urged as error. The main purpose of the litigation, as shown by the petition, was to trace the stolen fund through the burglars into the hands of the police officers and restore it to the owner. It is alleged that the burglars are insolvent. The recovery of a judgment against them was consequently a secondary matter. They had in their possession only a

portion of the amount stolen, when searched, and as to that plaintiff was seeking redress by enjoining the policemen from transferring it to others and by establishing a constructive trust. In the petition there was no attempt to describe the particular denominations of money taken from the bank or found in the hands of the burglars or the police officers. There had been opportunity to change the currency into different items. Defendants were no less accountable because their possession grew out of a felony. Confidential relations are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property, a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found. *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546; *Newton v. Porter*, 5 Lans. (N. Y.) 416. The trial court treated the case as one in equity, and in doing so made no mistake. Having assumed jurisdiction for that purpose, it was properly retained for other purposes.

It is further argued that the money taken by the policemen from the burglars was not identified as the money taken from the bank at the time of the burglary, and that therefore there is no evidence to sustain the judgment of the trial court. The burglars procured the money in controversy by committing a felony. Evidence that they were guilty beyond a reasonable doubt was essential to their conviction in the criminal court; but, in a suit in equity to restore the stolen funds to the owner, plaintiff is only required to establish the allegations of the petition by a preponderance of the evidence. *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546. Even in a criminal case a burglary may be shown by circumstantial evidence. *Morrison v. State*, 88 Neb. 682.

A silver dollar taken from the burglars by the police officers was described by the cashier of the bank as fol-

lows: "On Wednesday night prior to the robbery I rolled and placed in the safe some rolls of silver dollars. My attention was particularly called to a mutilated dollar which I rolled and put in the safe. On account of its bent condition, it would not go in the roll without bulging the ends of the paper roll, and at the time I noticed that the end of the roll was bulged. This mutilated dollar had three dents on one side of it near the edge, which bent it so it would not lay down close to another silver dollar. To the best of my knowledge it was bent on the eagle side of the dollar." By fair inference from the testimony this identical coin was traced from the bank to Malone through the burglars, in whose possession it was found shortly after the burglary had been committed. Their possession of the coin was not explained. In a prosecution for larceny, the unexplained possession by accused of a portion of the stolen property, shortly after the theft, when considered with all the evidence adduced at the trial, may be sufficient to sustain a finding that he stole the whole. *Thompson v. State*, 6 Neb. 102; *Palmer v. State*, 70 Neb. 136. The application of this principle to the present case leads to a holding that the judgment is supported by the evidence. The finding of the trial court will therefore be sustained.

Malone claims the right to retain \$700 as a reward, but under the evidence he is not entitled thereto.

The principal argument was directed to the proposition that the record of the conviction of the burglars in the criminal case was erroneously admitted in evidence, but discussion of that question is unnecessary, since the evidence was sufficient without such proof, and prejudice will not be presumed from its admission, the case having been heard before the court without a jury.

Other questions are raised, but do not suggest a sufficient reason for a reversal.

AFFIRMED.

REESE, C. J., concurs in the result.

SEDGWICK, J., not sitting.

IN RE ESTATE OF HERMAN RUSCH,**HERMINE MUCHOW, GUARDIAN, APPELLANT, V. ANNA KATZ,
ADMINISTRATRIX, APPELLEE.****FILED MAY 6, 1911. No. 16,417.**

Courts: JURISDICTION: ALLOWANCE FOR MAINTENANCE OF CHILD. Where the district court grants a divorce to a wife, commits to her the custody of a minor child, and requires the husband to pay a fixed sum for the child's maintenance during minority, the county court, after the death of the husband, has no authority, in passing on a claim against decedent's estate for an additional allowance for the same purpose, to increase the amount fixed by the decree of the district court, as long as it remains unchanged.

APPEAL from the district court for Johnson county:
LEANDER M. PEMBERTON, JUDGE. Affirmed.

Oscar Douglas and Hugh La Master, for appellant.

S. P. Davidson, contra.

ROSE, J.

This is a controversy over the allowance of a 2,000-dollar claim against the estate of Herman Rusch, deceased, for the support of his infant daughter, Emma E. Rusch. The claim was filed in the county court of Johnson county by the infant's mother and guardian, Hermine Muchow, formerly Hermine Rusch, the parents having been divorced. Objections were filed by Anna Katz, administratrix of decedent's estate. The county court allowed the claim to the extent of \$500, and the administratrix appealed to the district court, the guardian's petition therein stating, in substance: Since November 8, 1908, plaintiff has been the duly appointed and acting guardian of Emma E. Rusch, a minor ten years of age. Decedent and plaintiff were husband and wife from December, 1896, to July 14, 1906. The minor named is their daughter. In the district court for Johnson county plaintiff, on the ground of extreme cruelty,

In re Estate of Rusch.

obtained a divorce. Under the decree of separation, the custody, control and care of the child were committed to plaintiff, who was allowed \$1,000 for her support during her minority. The decree is now in full force and effect. Herman Rusch died in Johnson county, May 17, 1907, leaving a will by which he attempted to give all of his property to his five other children, nothing being left to his infant daughter Emma E. Rusch, though he had at the time of his death property of the value of \$30,000 above all debts and incumbrances. Since the divorce was granted, it has cost upwards of \$3.50 a week to properly board, clothe, educate and maintain the ward, as her station in life requires. From the date of the filing of plaintiff's claim until the ward arrives at her majority, it will require upwards of \$4 a week to properly support and maintain her. No provision has been made for her support and maintenance, except the \$1,000 mentioned, a considerable portion of which has already been used. The amount remaining is wholly insufficient for the purposes stated, and it will require at least \$2,000 more. There is a prayer for the allowance of the claim in full. A demurrer to the petition was sustained, and from a judgment of dismissal plaintiff has appealed.

The demurrer raises the point that the subject matter of plaintiff's claim was within the jurisdiction of the district court in the divorce case, and that consequently it could not be adjudicated by the county court, nor taken to the district court by appeal. The sum of plaintiff's argument on this question seems to be: The defendant in the divorce case is dead and the cause cannot be revived against his estate. The claim for an additional amount for the support of the ward was not adjudicated therein and may be allowed at any time. It is the duty of a father to support his minor child after his wife procures a divorce on the ground of extreme cruelty. Since the death of the ward's father, the settlement of his estate, including plaintiff's claim, has been a matter within the exclusive jurisdiction of the county court, under the constitutional

provision that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estate of deceased persons, appointment of guardians, and settlement of their accounts." Const. art. VI, sec. 16. In support of this argument *Eldred v. Eldred*, 62 Neb. 613, is cited. The rules therein announced are: "A decree of divorce obtained by a wife upon service by publication, without appearance of defendant, in a foreign state, is a bar to an action for alimony in this state, to be awarded out of his property here;" and "the fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children, and will not defeat an action therefor." In the case cited, however, the court, when severing the marriage relation in the divorce suit, made no provision for the support of the minor child. That decision, therefore, does not control here.

In the present case the validity of the decree granting the divorce and making an allowance for the support of plaintiff's ward is unquestioned. Both of these matters were within the original jurisdiction of the district court in the divorce case. The statute provides: "Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain.

"The court may from time to time, afterwards, on the petition of either of the parents, revive and alter such decree concerning the care, custody, and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require.

"Upon every divorce from the bonds of matrimony
* * * if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and

In re Estate of Rusch.

maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties and all other circumstances of the case." Comp St. 1909, ch. 25, secs. 15, 16, 22.

It thus appears that the district court not only had jurisdiction to make full provision for the care, custody and maintenance of the child, but in acting within that jurisdiction retained power to revive and alter the decree to meet changing circumstances and conditions. In the legitimate exercise of its authority the district court assumed jurisdiction over the entire subject of maintenance before decedent left any estate to settle in the county court. This jurisdiction was not lost by the death of a party to the suit. It is a familiar rule that, where a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes. The county court, by passing on a claim against decedent's estate for the ward's support, cannot deprive the district court of its jurisdiction to amend its own decree fixing the amount necessary for that purpose. The district court allowed \$1,000 for the support of the ward during her minority, and part of it has not been used. On the assumption that an allowance is grossly excessive under changed conditions, could the county court, in settling decedent's estate, order the guardian to turn a portion of the unexpended balance over to the administratrix without a modification of the decree? Reasons for an affirmative answer are not apparent, nor is the authority of the county court to increase the allowance any more evident. To do either would be to modify in a collateral proceeding the decree of a court of superior jurisdiction. The law has created no such anomaly.

It is insisted by plaintiff, however, that she is without a forum, if she cannot obtain redress in the county court,

Harper v. Harper.

because the statute, so she asserts, provides no way to revive the decree of divorce after the death of the husband. This argument is not persuasive. The decree relates to both divorce and maintenance. Revivor as to the latter subject alone is necessary. The divorce would not be disturbed. The statute quoted expressly provides that the court, from time to time, may revive and alter the decree "concerning the care, custody and maintenance of the children." As to maintenance the decree is subject to change. It may bind the father while he is living and his estate when he is dead. The obligation of a father to support his helpless offspring may survive both divorce and death. *Miller v. Miller*, 64 Me. 484; *Seibly v. Person*, 105 Mich. 584.

The trial court properly sustained the demurrer, and the judgment is

AFFIRMED.

FLORA V. HARPER, APPELLEE, V. JOHN ROBERT HARPER ET AL., APPELLANTS.

FILED MAY 6, 1911. No. 16,428.

Partition: ALLOWANCE TO ATTORNEY. Where all the proceedings in partition, from the time the decree confirming shares is entered until distribution is made under a sale by a referee, are amicable and are properly conducted by plaintiff's attorney exclusively, the trial court may allow him a reasonable fee to be paid by the interested parties in proportion to their interest in the property sold.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. Affirmed.

Albert & Wagner, for appellants.

R. P. Drake and *A. M. Post*, contra.

ROSE, J.

This is an appeal by defendants from an order allowing a fee of \$750 to plaintiff's attorney in a suit for partition. Flora V. Harper, widow of Joseph Harper, deceased, is the sole plaintiff. The only defendants who were adjudged to have an interest in the lands in controversy are six children and heirs at law of decedent; plaintiff being his second wife and the mother of one of the defendants only. After the share of each interested party was established by decree, plaintiff consented to the sale of the lands, including her homestead, the present value of which she agreed to take in money. Later the lands were sold by a referee, and the proceeds were distributed according to the respective shares of the parties. Out of the common fund the trial court allowed the attorney for plaintiff a fee for his services.

The only question presented by the appeal is stated by defendants as follows: "Does the record justify the allowance of a fee of \$750 to plaintiff's attorney as a part of the costs in the case?" In assailing the allowance, defendants assert that the proceedings were adversary, and argue that no fee can be allowed as costs for the compensation of plaintiff's attorney without violating the following rule: "The plaintiff's attorney's fees are not taxable as costs in an action for partition where the proceedings are adversary." *Oliver v. Lansing*, 57 Neb. 352. Plaintiff's attorney insists that the proceedings were amicable throughout, and that the fee was properly allowed under the following doctrine: "A partition proceeding is one for the benefit of all the parties in interest, and where such proceedings are amicable it is proper for the trial court to allow the attorneys conducting the proceedings a reasonable attorney's fee, and to require the payment of the same by the parties in proportion to their interest in the property involved." *Johnson v. Emerick*, 74 Neb. 303.

The record fairly shows that the attorney for plaintiff

in drawing her petition asked for more than she was entitled to recover, and that defendants properly employed other counsel to resist the demand for unwarranted relief. To the partition, however, no resistance was made. There is no bill of exceptions, but the transcript shows that the hostility to plaintiff's excessive demand ended with the decree confirming shares and ordering the sale. Afterward, at least, plaintiff's attorney conducted the proceedings for the benefit of all parties entitled to share in the distribution of the proceeds. A referee was appointed. Several tracts of land were advertised and sold at sums aggregating more than \$37,000. The sales were confirmed. Deeds were made to the purchasers. The proceeds were distributed among the parties entitled thereto, and defendants accepted the fruits of the services rendered by plaintiff's attorney in these proceedings. There is nothing to show that in conducting them he was assisted by counsel for defendants. He claimed from the common fund \$1,200 as an attorney's fee. Defendants objected to the allowance of any sum for that purpose. The trial court allowed \$750, but made no special findings. The allowance itself necessarily includes, at least, a general finding that the important proceedings relating to the sale, to the transfer of title, and to the distribution of more than \$37,000 were not adversary, and the transcript contains nothing to show that, from the time the shares were confirmed until plaintiff's attorney demanded compensation for his services, the proceedings were not amicable. The amount of the fee, if allowable in any sum, is not questioned. On the face of the transcript, therefore, the allowance was proper, under the rule announced in the case last cited.

AFFIRMED.

LETTON, J., took no part in this decision.

Harrington v. Hedlund.

MICHAEL F. HARRINGTON ET AL., APPELLEES, V. JOHN HEDLUND, APPELLANT.

FILED MAY 6, 1911. No. 16,445.

1. **Continuance: DISCRETION OF COURT: REVIEW.** In absence of an abuse of discretion on part of the trial court, reversible error does not appear in an order denying a continuance.
2. **Appeal: ADMISSION OF EVIDENCE: OBJECTIONS.** Appellant cannot predicate error on the admission of incompetent testimony to which he made no objection.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. Affirmed.

John A. Davies, for appellant.

R. R. Dickson, contra.

ROSE, J.

Plaintiffs are attorneys at law, and brought this action to recover \$320 for professional services in procuring for defendant the title to a quarter-section of land in Boyd county. Defendant had settled on the land, and attempted to obtain a patent for it from the federal government under the homestead laws, but was defeated because it was in that part of the Fort Randall Military Reservation selected by the state as school lands in lieu of other school lands of which the state had been deprived by early homesteaders. Defendant's controversies extended over a series of years, and he eventually acquired title from the state. In the meantime his claims were alternately presented by plaintiffs to the federal land office, to the interior department at Washington, and to the state legislature, and he was in constant litigation in both state and federal courts. In these matters plaintiffs also acted on behalf of other settlers similarly situated. The case was tried to a jury, and from a judgment for the full amount of their claim defendant has appealed.

1. The first assignment of error is based on an order overruling a motion by defendant for a continuance. He resided in Boyd county, but was sued in Holt. An affidavit in support of the motion shows, in substance: The defense is based on a contract whereby plaintiffs agreed that, if they were unable to secure the land for defendant at \$7 an acre, no charge against him would be made by them except for expenses, which have already been paid. To establish his defense he relies upon the attendance of 15 residents of Boyd county, who were present when the agreement was made, and against whom plaintiffs assert that they have claims for professional services. For the purpose of enforcing such claims, plaintiffs have threatened his Boyd county witnesses with suits in Holt county, and in consequence they refuse to attend court therein to testify on behalf of defendant. It is therefore necessary to take their depositions. Defendant expects to show by them that plaintiffs have not performed their agreement with him, and will have the depositions ready by the next term of court. He was taken by surprise when plaintiffs threatened to sue his witnesses. The motion is not made for the purpose of delay.

This suit was commenced originally in the county court of Holt county, and was afterward appealed to the district court. Defendant therefore had ample time for preparation. The proofs show that, before commencing this suit, plaintiffs threatened to sue him in Holt county, if he did not pay them their fees. Having himself been thus threatened, he ought not to have been surprised by like threats to sue other clients similarly situated. With the record in the condition described, it cannot be said on appeal that the trial court abused its discretion in overruling the motion.

2. Error in admitting proof that plaintiffs appeared before a committee of the legislature on behalf of defendant, though they made no claim in their petition for such services, is also assigned. While some objections to testimony of this character were interposed, details of all the

Brucker v. Kairn.

facts relating thereto were admitted without objection. It follows that the judgment cannot be reversed on this ground.

No other assignment of error being urged, the judgment is

AFFIRMED.

**WILLIAM C. BRUCKER ET AL., APPELLEES, V. M. F. KAIRN
ET AL., APPELLANTS.**

FILED MAY 6, 1911. No. 16,374.

1. **Sales: FALSE REPRESENTATIONS: REMEDIES.** If, to induce a party to purchase what is claimed to be an imported Percheron stallion, representations are made by the vendor of material facts which, if true, would greatly enhance the value of the animal, but which are false and known by the vendor to be false; or, if without knowledge of their falsity the statements are made by the vendor as representations of positive facts, they will, if believed to be true and relied and acted upon by the vendee in making the purchase, to his injury, support an action by the vendee for damages or for a rescission of the contract.
2. **Fraud: FALSE REPRESENTATIONS.** "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Foley v. Holtry*, 43 Neb. 133.
3. **Appeal: INSTRUCTIONS: REVIEW.** This court will not search for error in the instructions. It is the duty of counsel who assails them to point out with reasonable particularity the error therein; failing so to do, it will be presumed that none exists.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

L. W. Colby, for appellants.

Hazlett & Jack and *S. D. Killen*, contra.

FAWCETT, J.

The petition alleges substantially: That on November 14, 1904, plaintiffs associated themselves together under the name of the Barneston Percheron Horse Company, for the purpose of purchasing and using an imported Percheron stallion named "Ulin"; that defendants, for the purpose of selling the horse referred to, represented to plaintiffs that they represented Robert Burgess & Son of Wenona, Illinois; that the stallion was the property of said Illinois firm; that it was a Percheron stallion and registered as such in France; that it was imported by the Illinois firm from France and again registered in the United States as a Percheron horse; that, in addition to said oral representations, they furnished plaintiffs a certain printed and written instrument, attached to the petition as exhibit A, in and by which defendants represented that the horse they were offering to sell to plaintiffs was a Percheron horse named "Ulin"; that on said day defendants delivered to plaintiffs a second printed and written instrument, exhibit B, in which the horse they were offering to sell plaintiffs was described as a Percheron stallion named "Ulin," and that said horse was the property of said Illinois firm; that defendants also executed and delivered to plaintiffs a bill of sale, exhibit C, "purporting to be executed by M. F. Kairn, agent for Robert Burgess & Son of Wenona, Illinois, and purporting to sell a certain stallion named 'Ulin' to these plaintiffs," a copy of which is attached to the petition; that, relying upon said oral and written representations, and believing the same were true, plaintiffs purchased from defendants the stallion referred to, "which they believed was a Percheron horse named 'Ulin,' and imported by Robert Burgess & Son, and registered in France as a Percheron horse, and that said horse was registered as a Percheron horse in the United States, and that said horse was the property of Robert Burgess & Son and imported by them; and, believing all the representations so made by said de-

fendants, did purchase said horse and pay the defendants the sum of three thousand (\$3,000) dollars therefor;" that all of said representations so made by defendants were wholly false, and were made for the fraudulent purpose of inducing plaintiffs "to purchase a certain horse owned by them, and which horse, sold to these plaintiffs, was not a Percheron horse, was not registered in France as a Percheron horse, was not imported by Robert Burgess & Son of Wenona, Illinois, was not registered in the United States as a Percheron horse, and was not and is not the horse represented by defendants to plaintiffs; that said horse was not of the value of \$3,000, nor was it of the value to exceed \$200. And, by reason of said false and fraudulent representations, plaintiffs were defrauded by said defendants out of the money so paid as above, and that they were damaged in the sum of \$2,800 by reason of said fraudulent and false representations so made as above." A second cause of action was set out, but it was withdrawn from the jury during the trial, and no errors are predicated thereon by either party. The prayer is for \$2,800 and interest.

Exhibit A recites: "Know all men by these presents: That Burgess & Son has this day sold to" plaintiffs (naming them), "the Percheron stallion, named Ulin." This paper is signed "M. F. Kairn."

Exhibit B reads: "Certificate of insurance. Robert Burgess & Son. Wenona, Illinois. The Only Importing Firm on Earth that Makes an Investment Safe by Replacing the Horse in Case of Death. It is mutually agreed by and between Robert Burgess & Son, of Wenona, Illinois, parties of the first part, and the purchasers of the stallion Percheron Ulin 11,548, parties of the second part," etc. This paper is also signed "M. F. Kairn."

Exhibit C, the bill of sale, reads as follows: "Know all men by these presents: That Burgess and Son of Wenona, Ill., by their agent, *M. F. Kairn* of the county of *Marshall*, state of Ill., party of the first part, for and in consideration of the sum of *three thousand & no-100*

dollars, lawful money of the United States, to *him* in hand paid, at or before the delivery of these presents by *Barneston Percheron Horse Co. of Barneston, Nebr.*, party of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, *their* executors, administrators, and assigns *Burgess and Son, stallion named Ulin, color gray, aged six (6) years*, belonging to *him*, and now in *his* possession, at the place last aforesaid. To have and to hold the same unto the said party of the second part, *his* executors, administrators, and assigns, forever. And *I* do, for *my* heirs, executors, and administrators, covenant and agree to and with the said party of the second part, *their* executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made, unto the said *party* of the second part, *their* executors, administrators, and assigns, against all and every person and persons whomsoever. In witness whereof, I have hereunto set my hand this fourteenth day of Nov. 1904. M. F. Kairn, as agent for Burgess & Son. Signed and delivered in the presence of _____."

Service was not obtained upon defendant Kairn. Defendant Dixon appeared and answered for himself, first, that the petition does not state facts sufficient to constitute a cause of action; second, a general denial. There was a trial to the district court for Gage county and a jury, which resulted in a verdict and judgment for plaintiffs for \$1,500. Defendant Dixon appeals.

The only assignments of error argued by defendant are (1) the insufficiency of the petition; (2) error in permitting certain evidence to be introduced over defendants' objection; and (3) error in the giving of instructions. These only will be considered, and in the order named.

1. The chief objection to the petition is the failure to allege that the representations made by defendant and relied upon by plaintiffs are not alleged to have been made

by defendants "with a full knowledge of the falsity of the same." While this may have been the rule in earlier days, we do not think it is now the rule anywhere. It certainly is not in this state. *Olcott v. Bolton*, 50 Neb. 779. Defendant further urges that "the purchaser could not blindly trust when he should know, and close his eyes where ordinary diligence required him to see." While that contention is true in some cases, it has no application when the representation is a positive statement of fact, where an investigation would be required to discover the truth. In such a case, a person is justified in relying upon the representations so made. *Foley v. Holtry*, 43 Neb. 133.

2. Questions 234, 235, 237, 238, 249, 251 and 252, and the answers thereto, were testimony given by Mr. Rawley, one of the plaintiffs as to statements made by Kairn to the witness and some of the other plaintiffs in his presence, when defendant Dixon was not present. This testimony was as to statements made to the witness and his coplaintiffs by Kairn, that the horse was an imported French Percheron horse, that Kairn said he was representing Robert Burgess & Son in the transaction, "and that they were a company of them out here selling horses." Mr. Rawley further testified that during the negotiations he met defendant Dixon; that a conversation occurred between the witness and Kairn and Dixon. "Q. State what it was. A. Why, Kairn and I went down to Oketo, and Dixon was there, and he made me acquainted with him as foreman of this bunch of men working for Burgess & Son. Q. Did you believe what Kairn said to you there in the presence of Dixon? A. Why, yes, I believed him." He was then asked if Mr. Dixon was where he could hear the statement made by Mr. Kairn, to which he answered, "Yes." "Q. What did he do upon Mr. Kairn saying those words, what did Mr. Dixon do? A. He shook hands with me. Q. Did Mr. Dixon deny the truth of that statement of Kairn's? A. No, he did not." He then testified: "We looked at another horse there, another stallion. Q. What, if anything, did Mr. Dixon say? A. Why, I asked them what their price was on that horse,

and I think it was \$2,700, and I said, 'Why, he is a larger horse than you have in Barneston' (the horse Ulin), and Dixon said, 'Why, the horse we have in Barneston is an imported horse, and this is an American bred horse,' he said, 'That is the difference';" that he believed what Mr. Dixon said about the horse at Barneston—the horse Ulin—being imported.

The deposition of Kairn was taken by plaintiffs. He identified the pedigree which was furnished plaintiffs, which he gave to plaintiff Rawley in two parts—the French part and the American part. He testified that he received these documents from Dixon for the purpose of using them in connection with the sale of this horse. The testimony of two witnesses, introduced as experts on handwriting, is to the effect that the word "gray" in the American part of the pedigree is in the handwriting of defendant Dixon. Kairn also identified two letters received by him from Dixon and two written by him to Dixon. The expert witnesses on handwriting both testified that the handwriting in the letters from Dixon to Kairn is the same as the handwriting in the word "gray" above referred to. In the light of this direct connection of Dixon with Kairn, the court did not err in admitting the testimony above referred to. The testimony of the witness Brichat and of Kairn shows that the horse sold to plaintiffs was not an imported French Percheron, but was foaled in Washington county, Kansas, and was never owned by the importers, Burgess & Sons. Mr. Brichat testified that he had known the horse ever since he was foaled, and owned him part of the time.

It would serve no good purpose to refer further to the evidence in this case. It is amply sufficient to show that defendant Dixon was acting in concert with Kairn in the sale of this horse; that they perpetrated a fraud upon plaintiffs, and that Dixon received the greater portion of the "spoils." Having jointly participated in the fraud that was perpetrated upon plaintiffs, each is liable for the fraud and misrepresentations of the other in regard to the business then in hand. This proposition is so well established

Mauzy v. Hinrichs.

and universally recognized that citation of authorities is unnecessary.

3. Defendant's entire discussion of this point is in the following language: "The instructions given to the jury are contrary to law and are erroneous." This is too general. It is no part of our duty to search the instructions, or any other part of the record, for error. That duty rests upon counsel who assigns error. If he believes that the court below has committed error, it is his duty to aid this court by pointing out such error with reasonable particularity.

No error having been called to our attention, the judgment of the district court is

AFFIRMED.

MARY ANN MAUZY ET AL., APPELLANTS, V. CLAUS HINRICH
ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,389.

1. **Descent and Distribution: SCHOOL LANDS.** The interest of a vendee in possession of school lands under a contract of purchase from the state, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator. It is alienable, descendible and devisable in like manner as if it were real estate held by a legal title.
2. **Appeal: ISSUES.** The supreme court will not consider on appeal issues not tendered by the pleadings.
3. ———: **THEORY OF CASE.** Parties will as a rule be restricted in the supreme court to the theory upon which the cause was tried in the court below.
4. **Evidence examined and referred to in the opinion, held insufficient to entitle plaintiffs to any of the relief demanded in their petition.**

APPEAL from the district court for Seward county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

J. C. McNerney and O. B. Polk, for appellants.

J. J. Thomas, Edwin Vail and Norval Bros., contra.

FAWCETT, J.

On or about February 27, 1884, Neils Christensen purchased from the state of Nebraska 40 acres, and on January 1, 1885, the other 120 acres of the land in controversy, at \$7 an acre, paying in each instance one-tenth of the purchase price. He took possession of the land and continued to make the interest payments thereon until on or about October 28, 1888, when he departed this life, leaving surviving him his widow, Minnie, and his children, Mary A., Elizabeth K., Clara J., John H. and Rosa L. Rosa L. at that time was about seven months old. She died in 1893, leaving her brother and sisters and mother, above named, as her sole heirs at law. At the time of the death of Mr. Christensen the children were all minors; the eldest being less than nine years of age. The mother was subsequently appointed administratrix of her husband's estate and guardian of the minor children. At the time of the trial of this case she had not been discharged either as administratrix or guardian. After the death of Mr. Christensen the administratrix made two or three payments of interest upon the school land contracts, but neither she nor Mr. Christensen in his lifetime ever made any further payments of principal. On May 4, 1891, by and with the written approval of the probate judge, she, as administratrix, sold and assigned the two land contracts to one A. L. Craig, for a cash consideration of \$1,600, said assignments being filed on the next day in the office of the commissioner of public lands and buildings. Upon May 28, 1891, Craig assigned the contracts to Harriet I. Jones, and on May 24, 1897, Mrs. Jones assigned them to her son, Harry T. Jones, one of the defendants herein. Mr. Jones held the contracts until January 8, 1901, when he made full and final payment of the amount due upon the two contracts

Mauzy v. Hinrichs.

and received deeds from the state for the lands described therein. On July 8, 1902, Jones conveyed the land in controversy, by warranty deed, to defendant Claus Hinrichs for a consideration of \$5,000. During the time that Harriet I. and Harry T. Jones held the lands under the contracts and deeds respectively, they made valuable improvements thereon, in the construction of buildings and fences and breaking and cultivation of the land. Defendant Hinrichs was in possession of the lands for a number of years, prior to the time he purchased them, as a tenant of Mr. Jones, and after his purchase he took possession as owner and has held the same ever since. Plaintiffs brought this suit to recover the lands in controversy as heirs of Neils Christensen and Rosa L. Christensen, and based their right to a recovery upon the ground that the assignments of the school land contracts by Minnie Christensen as administratrix, even though with the approval of the probate judge, were void and of no force or effect; that neither Craig, nor any person under him, acquired any right, interest or title thereby to said lands. They allege that the defendants and each of them at all times had full notice and knowledge of the state of the title to the lands and of the rights of plaintiffs therein; that defendant Harry T. Jones took and held the legal title to the lands as trustee for and in behalf of plaintiffs; and that defendant Hinrichs took the legal title from Jones with full knowledge and notice of said trust and of the record title to the lands, and now holds the legal title in trust for plaintiffs. Trial to the court. Decree for defendants. Plaintiffs appeal.

At the time Hinrichs purchased the land from Jones he borrowed \$1,000 of the purchase money from the Jones National Bank, giving a mortgage therefor; but, as the record shows that that mortgage was afterwards fully paid by Mr. Hinrichs and released of record, no reason is apparent to us why that question should be considered here. No attempt was made by plaintiffs upon the trial to show actual notice to any of the assignees of the contracts other

than that appearing upon the face of the contracts, or rather upon the first assignments thereto by the administratrix, upon the face of which assignments it appeared that she was assigning the contracts as administratrix, and that the probate judge had, in writing, approved her action; nor was any attempt made by plaintiffs to show any actual notice to defendant Hinrichs of any interest of the plaintiffs in the lands he was purchasing. As to defendant Hinrichs, it is urged that he made no examination of the records in the office of the county clerk of Seward county to ascertain the condition of the title, but that he purchased the land and took the title, relying upon the ability of his grantor, Harry T. Jones, to make good his covenants of warranty. It is the duty of one purchasing lands to make an inspection of the records, so as to ascertain the true condition of the title, and, if he fails so to do, he will be chargeable with everything which the records would have shown had he made such examination, but nothing more. In the present case, if Mr. Hinrichs had examined the records in the office of the county clerk, he would have learned from such records that Neils Christensen had purchased these lands from the state under school land contracts on the dates already stated, and that on the 8th day of January, 1901, payment in full of the balance due upon those contracts had been made by "Harry T. Jones, assignee," and that the state had issued to Mr. Jones deeds for the lands. The recitals in the deeds from the state are as follows: "Whereas on the 8th day of January, 1885 (in the one deed; February 27, 1884, in the other), all that tract or parcel of common school land of the state of Nebraska hereinafter mentioned and particularly described was sold in the manner provided by law to Neils Christensen of the county of Seward, and state of Nebraska, for the aggregate price of eight hundred and forty dollars (in the one case, and two hundred and eighty dollars in the other), has been fully paid to the proper receiving officer for the state of Nebraska, by Harry T. Jones, assignee, as shown by the records in the office of the

commissioner of public lands and buildings, and said sum being the whole amount of the purchase price for the said tract or parcel of land hereinafter described, now know ye," etc. We are unable to see anything in these deeds to put Mr. Hinrichs upon inquiry. He had a perfect right to assume that the officers of the state had done their duty and had not issued deeds to any one not entitled thereto. The officers of the state having recited in their deeds that the school lands had been purchased by Neils Christensen and that the full purchase price had been paid by "Harry T. Jones, assignee," we do not think he was required to investigate the question as to how Harry T. Jones became the assignee, but that any prudent man or examiner of abstracts would have been warranted in assuming from those recitals that Harry T. Jones was the direct assignee of Neils Christensen. The uncontradicted evidence shows that Mr. Hinrichs did not know Christensen nor any members of his family; that he knew nothing about his estate or what had been done with it, or of the assignments which had been made by the various parties above noted; and that he had been a tenant under Mr. Jones for about seven years, immediately prior to his purchase of the land, during all of which time he never had heard the title of Mr. Jones questioned. We are unable to find anything in the record even tending to show that Mr. Hinrichs was not a purchaser in good faith for a full and fair consideration, and without notice, either actual or constructive, of any outstanding equities or defects in the title. As to him, therefore, the judgment of the district court was clearly right.

It is now contended by plaintiffs that, even if defendant Hinrichs be held to be an innocent purchaser of the land without notice, that "would not relieve appellee Jones from a judgment in appellants' favor and against him for the consideration received by him from Hinrichs," upon the ground that "he, while constructive trustee for appellants, sold the trust property and appropriated the fund to his own use." The trouble with this contention is

that such a judgment could not find support either in the pleadings or the evidence. There is no doubt about the soundness of the contention that the administratrix had no authority, either with or without the approval of the county judge, to sell the equity of the plaintiffs in the lands described in the contracts, or to assign the contracts themselves which were the evidences of such equitable interest. Such authority could be obtained only through a proper proceeding in the district court. But, conceding that everything alleged by plaintiffs as to the unauthorized sale and assignment of the land and contracts, and conceding, without deciding, that defendant Harry T. Jones was chargeable with notice of the unauthorized assignments to Craig, under whom he held his assignments through the intermediate assignment of Harriet I. Jones, then, at the time of commencing this suit, plaintiffs had an election between two remedies; one to follow the land and recover it if found in any one who was not an innocent purchaser, or an action at law against Jones for their damages; in which action either side would be entitled to a jury trial.

We think that under a fair construction of their petition they elected to follow the land, and thereby, for the purposes of this case, waived their other remedy; but, conceding that they might pursue both remedies in one action or suit, and, if they fail to reach the land, obtain a money judgment for damages, they have not done so in this case. There is nothing in either the allegations or prayer of their petition to advise defendant Jones that they were seeking to recover a judgment against him for their damages, and the record plainly shows that the case was not tried in the court below upon any such theory. The prayer of their petition as to Jones is in the following language: "For a decree * * * finding and declaring that the defendant Harry T. Jones took and held the legal title to said lands as trustee only for and on behalf of these plaintiffs, and that his grantee, the defendant Claus Hinrichs, took and received the legal title of said lands with notice of the said trust and notice of the

Mauzy v. Hinrichs.

rights of these plaintiffs in and to said lands; * * * that an accounting be had of the amount paid by the defendant Jones upon the balance of the purchase price of said lands with interest to the state of Nebraska, and of the amount paid for taxes upon said lands by defendants, and of the amount and value of the rents, issues, and profits of said lands due to plaintiffs; that plaintiffs have judgment against defendants for any balance which may be found in their favor on said accounting; that they have judgment against defendants for their costs herein expended, and for such other and further and different relief as to the court may seem just and equitable in the premises."

It surely cannot be urged that the language of their prayer: "That an accounting be had of the amount paid by the defendant Jones upon the balance of the purchase price of said lands with interest to the state of Nebraska, and of the amount paid for taxes upon said lands by defendants, and of the amount and value of the rents, issues, and profits of said lands due to plaintiffs; that plaintiffs have judgment against defendants for any balance which may be found in their favor on said accounting"—is tantamount to a prayer that they be given a money judgment against Jones "for the consideration received by him from Hinrichs." We shall not extend this opinion by setting out the evidence. It is sufficient to say that the evidence falls as far short of showing a right to a money judgment against Jones as do the allegations and prayer of their petition. It is evident, therefore, that the court did not err in refusing plaintiffs any relief against defendant Jones.

From a careful examination of the pleadings and evidence, we are unable to discover any error in the record, and the judgment of the district court is therefore

AFFIRMED.

EDGAR GOFF V. STATE OF NEBRASKA.

FILED MAY 6, 1911. No. 17,056.

1. **Information: SUFFICIENCY.** "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." *Cordson v. State*, 77 Neb. 416.
2. **Criminal Law: INSTRUCTIONS: EXCEPTIONS.** "It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb. 124, that a general exception to a charge to a jury is unavailing unless the entire charge is erroneous." *Redman v. Voss*, 46 Neb. 512.

ERROR to the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Andrew P. Moran, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

FAWCETT, J.

Edgar Goff, hereinafter called the defendant, was tried in the district court for Otoe county under section 16 of the criminal code for a felonious assault. He was found guilty and sentenced to the penitentiary for a term of two years. He now prosecutes error to this court. Section 16 is as follows: "If any person shall maliciously shoot, stab, cut or shoot at any other person, with intent to kill, wound, or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

His first contention is that the information upon which he was tried does not state facts sufficient to charge him with the commission of any crime, in that it does not allege "that any weapon of any kind was used in making the assault," and therefore the defendant had no knowl-

edge that the state would attempt to prove that the assault was made with a knife, and that defendant was thereby taken by surprise. It is urged that the information should make the charge specifically and definitely in order that the accused may know the nature of the charge against him. A number of authorities are cited, but we do not deem it necessary to refer to them, as we think that question is definitely settled in this state. We have repeatedly held that, where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. *Murphey v. State*, 43 Neb. 34; *Leisenberg v. State*, 60 Neb. 628; *Chapman v. State*, 61 Neb. 888; *Cordson v. State*, 77 Neb. 416. We do not think there is any force in the argument that, under an information which charges that the defendant did unlawfully, wilfully and maliciously cut and stab, evidence that the cutting and stabbing was done with a knife would be any surprise to the defendant. Common everyday language implies that cutting and stabbing is done with a knife. While one might be stabbed with a fork or cut with a razor, he could not be both cut and stabbed with either. But, be that as it may, the information in this case follows the statute and was sufficient.

It is next contended that the court erred in its instructions to the jury, and erred in refusing a number of instructions requested by defendant. The only exception noted to these instructions is found in a paper filed in the case, which recites: "Comes now the defendant Edgar Goff and excepts to the instructions given by the court, and excepts especially to the following numbered instructions given by the court: Numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16. The defendant Edgar Goff excepts to the following instructions refused by the court, and especially to the following: Numbered 1, 2, 3, 4, 5, 6, 7, and offered by def." Under the oft-repeated holding of this court, this exception is not sufficient. *McReady v. Rogers*, 1 Neb. 124; *Redman v. Voss*, 46 Neb. 512; *Union P. R. Co. v. Montgomery*, 49 Neb. 429; *Bennett v. Mc-*

Donald, 52 Neb. 278. We repeat what we said in the second paragraph of the syllabus in *Redman v. Voss*, *supra*: "It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb. 124, that a general exception to a charge to a jury is unavailing unless the entire charge is erroneous." The exceptions in this case being general, both as to the instructions given by the court and as to those requested by defendant and refused, they are insufficient to lay the foundation for their review. We are the more ready to adhere to the rule last above announced by reason of the fact that, if defendant had properly saved his exceptions, it would not have availed him anything in this case, as a careful examination of the instructions given and refused does not disclose any error.

No complaint is made as to the sufficiency of the evidence to sustain the verdict. The record shows that the defendant was the aggressor from the beginning to the end of the affray in which he committed the crime for which he stands convicted. He had a fair trial, and was convicted upon sufficient, competent testimony, and must stand the consequences of his unlawful and unprovoked offense.

The judgment of the district court is

AFFIRMED.

JOHN D. CANNELL ET AL., APPELLANTS, V. JAMES J. ROUSH
ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,401. .

1. **Appeal: REVERSAL.** When the plaintiff is entitled to judgment upon the facts established by the evidence without any substantial conflict, a verdict and judgment for defendant will be reversed upon appeal.
2. **Brokers: ACTION FOR COMMISSIONS: ESTOPPEL.** When a broker is duly employed by the owner to assist in exchanging property, and an opportunity is found and exchange made by the joint efforts of the broker and the owner of the property exchanged, the

Cannell v. Roush.

owner will not be permitted to deny that the assistance of the broker was the proximate cause of the desired result.

APPEAL from the district court for Thayer county:
LESLIE G. HURD, JUDGE. *Reversed.*

J. T. McCuiston and F. N. Prout, for appellants.

Heasty, Barnes & Rain, contra.

SEDGWICK, J.

The defendants exchanged a stock of merchandise at Alexandria, this state, for a farm in Iowa. Afterwards the plaintiffs brought this action to recover commissions for their services as agents in assisting the defendants in making the exchange. The verdict and judgment were in favor of the defendants, and the plaintiffs have appealed.

There is no controversy as to the principal facts. By correspondence the defendants employed the plaintiffs, who are co-partners in business, to find a purchaser to exchange with them a farm for their stock of merchandise. Thereupon the plaintiffs procured a description of the stock of merchandise and advertised the proposition of exchange in a state paper, receiving several propositions, some of which were through one Johnson, a real estate agent at Council Bluffs. The plaintiffs informed the defendants of these propositions, and the defendants then came to Lincoln, where the plaintiffs were doing business, and one of the plaintiffs went with the defendants to investigate one of the properties that had been suggested by the plaintiffs, which is located near Chalco, this state, and then to see another property in Decatur county, Iowa, owned by one Henderson, and after investigating this property the defendant and the said Henderson, after some negotiations, found that they were not able to agree upon the exchange of property, and Mr. Henderson then informed the plaintiffs and the defendants that he had an acquaintance who lived near Tingley, in the state of Iowa, who had a farm that he desired to exchange for a stock of

merchandise, and he thought this farm might suit the plaintiffs. Thereupon, the parties all went to Tingley to see the proposed property for exchange.

Upon their arrival there, they examined the property in company with Mr. Shay, its owner, and propositions of exchange were made between defendant Roush and Mr. Shay. Mr. Roush testifies: "I told him that I couldn't make any permanent deal; that I would see the other partners of the firm before I made any other deal; I didn't know whether I wanted to make a deal or not; I would confer with them." Mr. Roush's partners in the business were his father and his wife. It was then arranged that, if Mr. Roush's report of the Shay property should be satisfactory to the other members of his firm, Mr. Shay or Mr. Henderson would go to Alexandria and look at the defendants' property. With this understanding the parties went to their respective homes, and the plaintiffs heard nothing further about the transaction until some time later they learned that the exchange had actually been made. It is now insisted by the defendants, and this seems to be the view taken by the jury, that the plaintiffs did not "have anything to do with the negotiations between Shay and Roush; that the trade was finally consummated by and between Henderson, Shay and Roush at Alexandria; that the trade was not made as a result of Cannell's exertions and Cannell was not the procuring cause, and it was not through the efforts of Cannell Brothers that the defendants 'got in communication' with Henderson and Shay." As already stated, these plaintiffs were expressly employed by the defendants in writing, through correspondence, to assist the defendants in exchanging their stock of merchandise for other property. When the plaintiffs had found, through their advertising at their own expense, opportunities which seemed favorable to make such exchange, and had notified the defendants of these opportunities, and the defendants went to investigate them, one of the plaintiffs accompanied the defendants, and when they found that the exchanges which they had in view

had failed, they learned, through one of the plaintiff's clients with whom they had hoped to make an exchange, that there might be an opportunity to make this exchange with Mr. Shay. Mr. Roush testified that, when it was found that he could not make the exchange with Mr. Henderson, he said to Mr. Cannell: "The deal is off, and we might as well go home." He now suggests that this had reference to his contract with Mr. Cannell, but this is manifestly not the case. It referred plainly to the deal which they expected to make with Mr. Henderson. There is nothing in the record to indicate that Mr. Cannell's services were no longer desired by Mr. Roush in the attempt to find an opportunity to make a favorable exchange, and they proceeded together to examine the Shay property. There is a little conflict in the evidence upon some minor points, but we have taken it as stated by Mr. Roush, or as clearly shown by uncontradicted evidence.

Do these facts show that Mr. Cannell found a customer with whom the exchange was made, as contemplated in the contract of agency between the defendants and Mr. Cannell? The evidence is uncontradicted that Mr. Cannell took an active part with the defendants in finding Mr. Shay and investigating the property which he proposed to exchange, and that his assistance in this regard was valuable to the defendants. The defendants duly employed the plaintiffs for this service in the beginning; they allowed them to continue their active assistance under their contract of employment; they have availed themselves of these services, and it was too late to repudiate them after the exchange was completed. They were jointly and severally active in bringing about this exchange. Neither party can maintain that he alone accomplished it. Each is estopped to deny that the efforts of the other were the proximate cause of the result. We think that under this evidence the plaintiffs were entitled to the agreed commission as a matter of law.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

MICHAEL H. MCCARTHY, APPELLEE, V. EDMOND H. BENEDIOT
ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,421.

1. **Mortgages: FORECLOSURE: MATURITY OF DEBT.** A provision in a mortgage given to secure a promissory note stipulating for the payment of interest semiannually, and that, if the interest is not paid when the same is due, the whole of the debt and interest shall immediately become due and payable and the mortgage may be foreclosed, is permissive merely, and the entire debt will not become due unless the mortgagee elect so to declare by instituting an action on the note or to foreclose. See *Lowenstein v. Phelan*, 17 Neb. 429.
2. **Judgment: VALIDITY.** A decree quieting title and canceling a mortgage, as barred by the statute of limitations, before the expiration of 10 years after maturity of the debt secured by it, would be erroneous, at least, and, if jurisdiction over the owner of the note and mortgage were not acquired, would be void. Whether the taking of an appeal from such decree would be such an appearance as to confer jurisdiction, provided the petition stated a cause of action, is not decided.
3. ———: ———: **CONCLUSIVENESS.** Assuming that the petition in such case stated a cause of action, and that jurisdiction over the persons of the defendants in the suit was acquired, such decree would not be binding upon the then holder of the note and mortgage, unless he were made a party to the suit and jurisdiction obtained over him. In such case he would not be precluded from bringing an action within the statutory period of limitations to foreclose his mortgage.
4. ———: ———: **BURDEN OF PROOF.** Where such action is brought and proceeds to a decree and issuance of an order of sale, and the sale is enjoined by the owner of the fee, basing his action upon the decree quieting his title and canceling the mortgage, it is incumbent upon him to allege and prove that in such suit the then holder of the note and mortgage was a party defendant over whom jurisdiction was obtained.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

E. H. Benedict and Flansburg & Williams, for appellants.

M. F. Harrington, contra.

REESE, C. J.

This is an action to enjoin the sale of real estate under a decree foreclosing a mortgage. From a rather imperfect record before us, it is made to appear that on September 25, 1888, one Searl, the then owner of the real estate involved, executed a mortgage to the Nebraska Mortgage & Investment Company to secure a debt for \$800 due October 1, 1893. The interest was payable semiannually. The mortgage contains a clause that, if there was a default in the payment of interest as it accrued, the debt should thereby be matured. The interest due March 1, 1890, was not paid, and no further payment of interest has been made. The mortgage was duly recorded on the 27th day of September, 1888. Through mesne conveyances plaintiff became the owner of the legal title to the property on the 5th day of May, 1902. On the 20th day of September, of the same year, he conveyed the property to Edwin S. Eves by warranty deed, but the conveyance was only in trust to enable Eves to make some kind of a trade for plaintiff. There was nothing placed of record to show the trust character of the conveyance, nor the interest retained by plaintiff. On the 1st day of November, of the same year, Eves reconveyed the land to plaintiff by warranty deed, but the deed was never recorded, and was finally lost. On the 21st day of December, 1906, Eves and wife executed to plaintiff a quitclaim deed, which was recorded on the 9th day of February, 1907. We are unable to find any direct proof that the deed from plaintiff to Eves was recorded, but from various recitals contained in the record we assume that it was. It was stipulated upon the trial in the district court that "plaintiff never took the actual possession of said land, except that between four and five

years ago he rented it one season to a Mr. Friend, so that he might cut hay thereon, and outside of that the actual (only?) possession the plaintiff has had of the land would be constructive possession by reason of his ownership." On the 7th day of May, 1902, plaintiff commenced a suit in the district court for Holt county to quiet his title as against said mortgage, alleging that, by the failure to pay the interest as it became due the mortgage debt was matured and became due and payable on the 1st day of May, 1890; that the 10 years' statute of limitations had elapsed, and the mortgage was no longer a lien, but remained a cloud upon his title. The parties named as defendants in that action were: "John Doe, real name unknown; the southeast quarter of section 23, in township 33, range 15 west in Holt county, Nebraska; the Nebraska Mortgage & Investment Company; and Charles K. Collins, as receiver of the Nebraska Mortgage & Investment Company." Notice of the pendency of the action was given by publication alone. It is alleged in the petition in this case, and admitted, that the mortgage was given to the Nebraska Mortgage & Investment Company of "Fremont, Dodge county, Nebraska." If that company, or the receiver, were domiciled in this state it is not apparent that jurisdiction could be acquired by publication. It is stipulated that the defendant in this case "had no notice of actual entry of the decree, or the pendency of the suit, until after the decree was entered." He was not a party to it.

On the 18th day of September, 1902, a decree was entered finding that, by reason of the nonpayment of interest, the debt had been matured, and that more than 10 years had elapsed prior to the commencement of the suit, and the mortgage was barred and was no lien on the land. The title was quieted and the mortgage was canceled. It cannot be doubted that that decree was at best erroneous. *Lowenstein v. Phelan*, 17 Neb. 429; *Richardson v. Warner*, 28 Fed. 343. An appeal was taken from the decree to the supreme court, and was here affirmed "for want of briefs," so stipulated on the trial. In taking that appeal, defend-

McCarthy v. Benedict.

ant acted as attorney for the appellants. While it is true that the statute of limitations had not run against the mortgage at the time of the commencement of that suit, nor at the time of the trial and entry of the decree, yet, if the district court acquired jurisdiction over the parties to the suit, the decree would be binding and final as to them, provided the petition stated a cause of action, and, if the mortgage was at that time held by any party to that suit, the right of defendant in this action would be foreclosed. On that question of jurisdiction we are left in darkness.

It is alleged that on the 25th day of September, 1903, "the defendant Edmund H. Benedict, claiming to have purchased the said mortgage and the obligation by it secured, commenced an action in the district court for Holt county, Nebraska, against Alexander Searl, Edwin S. Eves, Ida Eves, his wife, and the Commercial Investment Company" to foreclose the mortgage executed by Searl to the Nebraska Mortgage & Investment Company. At that time no one was in the actual possession or occupancy of the land in question. Plaintiff had no deed on file or of record; the record showing that Eves was the owner of the property. Plaintiff was not made a party to that suit. Summons were served upon Eves and wife personally, but no appearance was made by any defendant in that foreclosure proceeding, and a decree was entered foreclosing the mortgage and finding the amount due to be \$2,500. That decree was entered on the 2d day of April, 1908. On the 6th day of February, 1909, defendant caused an order of sale to issue directing the sale of the property, and placed the same in the hands of the sheriff for execution, when this suit was brought enjoining the sale.

It is contended that, at the time of the commencement of the suit by plaintiff to quiet title, the mortgage was barred by limitation; that the decree canceling the mortgage and quieting title is a bar to the foreclosure and cancels the mortgage, even if the bar by limitation did not previously exist; and that defendant's foreclosure of the mortgage was a void proceeding. It is stipulated that

plaintiff had no actual notice of the foreclosure proceedings until "two or three days before" the commencement of the present suit by him, having only such notice "as the record might impute." The cause was tried upon an agreed statement of facts, apparently given orally to the court, and which falls far short of being satisfactory. The mortgage was not barred by limitation at the time of the commencement of the foreclosure suit, as 10 years had not elapsed from the maturity of the note, unless the decree quieting the title, erroneous as it was, had the effect of canceling the mortgage. This would depend upon the jurisdiction of the court over the then owner of the note and mortgage. If the Nebraska Mortgage & Investment Company, or Collins as its receiver, if he were such, was the owner, the appearance in taking the appeal to this court might cure any defect in the jurisdiction over them, but this we do not now decide. If they were not such owner, the decree quieting the title could have no effect upon the validity of the mortgage. As we have seen, it is alleged in the petition "that on the 25th day of September, 1903, the defendant Edmund H. Benedict, claiming to have purchased the said mortgage and the obligation by it secured," commenced his action to foreclose the mortgage, but we find nothing anywhere in the record showing when the mortgage and investment company disposed of the note or when he became such owner. If before the suit to quiet the title, his rights were not affected by the decree, even if otherwise valid, as he was not a party to the action.

It is apparent that plaintiff has not been barred of his right to redeem from the mortgage. As he was not a party to the decree of foreclosure, his right was not affected thereby, and he should not be required to redeem from the decree, and for this reason the question as to the amount found due in the decree being excessive is not a material one.

The decree of the district court is reversed, and the cause is remanded, with directions to that court to enter a decree permitting plaintiff to redeem the land within a rea-

In re King.

sonable time by the payment of principal and interest due upon the mortgage if he elects to do so. In the event he fails to redeem within the time fixed by that court, the injunction to be dissolved.

REVERSED.

IN RE ORNAN J. KING.

FILED MAY 23, 1911. No. 16,954.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

John L. Webster and Earl D. Babst, for petitioner.

Grant G. Martin, Attorney General, George W. Ayres and F. M. Tyrrell, contra.

REESE, C. J.

Practically the only difference between this case and *In re Agnew*, p. 306, *post*, is that in this case plaintiff purchased the Uneeda Biscuit of the agent of the manufacturer, in this state, after the bundle or package in which the goods were imported had been broken, when the smaller units were purchased by plaintiff, exposed for sale and sold by him at retail. The same principles of law govern as in the *Agnew* case, and the decision therein is followed.

The petition is denied, and plaintiff is remanded to the custody of the sheriff of Lancaster county.

WRIT DENIED.

FAWCETT and ROSE, JJ., not sitting.

IN RE BURTON T. PAGE.

FILED MAY 23, 1911. No. 16,955.

1. **Stipulations.** An agreed statement and stipulation of the facts upon which a cause is to be decided should contain nothing but the material facts in issue. More than this is surplusage and redundant.
2. ———: **EXHIBITS.** Where a cause in an original action is submitted upon an agreed stipulation of facts in writing, and the stipulation refers to and embodies certain exhibits by specific reference, and they are presented to the court, explained and their use demonstrated during the argument, they become, and must be treated as a part of the evidence in the case and considered as fully as though the elucidation were embodied in the stipulation.
3. **Commerce: INTERSTATE AND INTRASTATE.** When goods, inclosed in a receptacle or package, are shipped from a point in one state to a point in another, they become and are a part of the interstate commerce of the country and retain that distinctive character until sold or the original package in which they were consigned is broken after they arrive at the point of destination. If the original package is broken by the consignee for the purpose of the sale of the smaller units or packages contained in the original inclosure, the interstate quality of the whole is lost, and the consignment becomes a part of the body of the property of the state and is subject to its laws.
4. **Habeas Corpus: BURDEN OF PROOF.** In an original application for a writ of habeas corpus whereby the plaintiff seeks his discharge from the custody of an officer holding a warrant or commitment regular on its face, it devolves upon the plaintiff to show that his detention is unlawful. Failing to do so, the application will be dismissed and the plaintiff remanded to the custody of the officer holding the authority for his detention.

ORIGINAL application for writ of habeas corpus. Writ denied.

John Lee Webster and Earl D. Babst, for petitioner.

Grant G. Martin, Attorney General, George W. Ayres and F. M. Tyrrell, contra.

REESE, C. J.

This is a companion case with *In re Agnew*, p. 306, *post*, and *In re King*, *ante*, p. 298, all having been submitted upon the same "agreed stipulation of facts," argued at the same time, and submitted on the same briefs.

Before entering upon a discussion of the case, we wish to enter our most emphatic disapproval of the manner of submission upon the so-called "agreed stipulation of facts," and to say that, had we known before argument of what we would have to encounter in the persual of the "stipulation of facts," we certainly should have refused to allow the cases to be submitted thereon, and have insisted that a reasonable stipulation should be filed. The agreed stipulation consists of 28 pages of printed matter of brief size, consisting of an historical sketch of the growth and development of the cracker trade, the receptacles in which the crackers were shipped, the handling of the crackers with the hands of the seller, weighing them in scales in which they were placed by the use of a scoop, then delivered or sent to the customers at their homes with other articles purchased, "such as soap, fish, cheese, kerosene, fruits, vegetables," etc., and by which they, "from their porous and crisp nature were subject to the baleful effects of the air, moisture, and dust, and deteriorated rapidly in substance and flavor, and were liable to, and frequently did, absorb to a greater or less degree a taste or flavor of the other articles with which they were so placed or commingled," etc. Then follows a history of the development of the package system of the National Biscuit Company, beginning with a history of the patented wrapper or paper box, made by machinery, and the placing therein of the biscuit "untouched by human hands and uncontaminated by the worst surroundings of its journey from the factory to the table of the consumer," the wonderful sale of "'Uneda Biscuit' at the uniform price of 5 cents per package," the "hundreds of millions of packages of 'Uneda Biscuit' having been so manufactured and advertised and sold through-

out the United States without, in a single instance, any statement being printed on the label of the net weight or measure of the contents exclusive of the container, but always, and in every instance, advertised and sold with the printed statement on the label, 'Five Cents a Package.' "

We are next regaled with a lucid and soul-stirring history of the construction of the two factories, one in the city of New York, and the other in Chicago, "at a cost * * * of several millions of dollars," and "arranged with special reference to the use of a series of machines and mechanical appliances invented for it, and so connected and placed that, in the process of manufacture, the crackers are carried by descending pans from the ovens on the top floor of the buildings to moving tables on a lower floor, where at the end of said tables are machines which by one stroke so assist in the simultaneous folding of a carton blank and a sheet of paraffin paper that the two become a unitary box structure, calculated to exclude air, moisture, dust, dirt, and vermin," until they "come along on the moving tables and their conveyors, and an employee takes whole, selected biscuit and puts them into the open package, just as quickly, easily and accurately as a chord is struck by a musician on an organ or piano, and the biscuit are then touched by human hands for the first and only time until opened in the home of the consumer." The method of filling the packages, the care to avoid breakages, "neither be too crowded nor too loose," are elaborately explained, as well as the automatic closing machines, the application of the "red Iner-seal Trade Mark" on each end, the formation of the "bundle," the placing of the bundle label "showing the legend 'Uneeda Biscuit, National Biscuit Company,' " then "trucked to cars for shipment," etc., the great value of plates and dies for printing labels and wrappers, the use of the best and highest grades of flour, the resultant "light, crisp and flaky" cracker, "which are prime elements of superiority and value."

After the patient perusal of the foregoing, but little of which is above referred to, there are about three pages of

cuts and prints of the 54 different kinds of packages, and, following this, three maps of the United States showing the location and boundary of each state and territory in the Union, excepting Alaska, Hawaii, Guam, Porto Rico, and the Philippine Islands. Why they are omitted is not explained. The margin of these maps are fairly well filled with legends showing the route of travel from the factory of supposedly all the different brands of crackers from the "Zu Zu Ginger Snaps" to "Barnum's Animals." Among other statements following the foregoing may be noted a reference to the extensive advertising of the "biscuit" and the aggregate of sales for the years 1889 to 1910, and a copious extract from the decision of a federal court upon the subject of the validity of the patent of a carton or wrapper in a cause where the question of an infringement was presented. The importance of that decision upon the questions here presented is not perceived. There is also a synopsis of the pure food laws of the United States and of all the states, which is scarcely deemed of sufficient importance to warrant their inclusion in a stipulation of facts in this case. The foregoing is but a brief epitome of the unimportant and unnecessary portions of the "stipulation." When we reflect the only purpose of this application is to ascertain if the provisions of the law of this state, requiring the net weight of the contents of a package to be upon it, shall be observed, the extended "stipulation" would hardly seem necessary. We are wholly unable to conceive why the records of this court should be loaded down with this great mass of what seems to us to be immaterial matter, to say nothing of consuming the time of the already overworked judges in reading it. An agreed statement of the facts upon which a cause is to be decided should contain nothing but the material facts in issue. More than this is surplusage and worse than redundant.

The material facts in this case differ from those in the two companion cases in that Page is not, strictly speaking, a retail dealer, but is said to be an agent of the foreign

In re Page.

nducting a "distributing house" in behalf of the manufacturer, and is ed articles to merchants, and pos- this state. The material and es- whether he sells the imported prod- l unbroken package in which it is ries at New York and Chicago to ks the package and sells the smaller separately? The decisions, some of e *Agnew*, hold that the right to im- e or nation carries with it the right hat the property retain its distinct- erstate commerce in a sale, it must oken, identical package as when or. If the container or package con- r packages, and the original or out- and the smaller units or packages i of the law of interstate commerce rty at once becomes a part of the the state and is subject to its laws. d to be open to dispute. The con- 'ore is: Were Page's sales made in i packages, as when consigned to ages, or containers, broken and the therefrom? The "agreed stipula- uite clear as to his procedure. In- of the parts of the so-called stipu- o refer to and dispose of the facts , they are so commingled as to ren- r to those of the other cases in order acts. Paragraph 10 of the stipula- l statement of the method of hand- 'age. It is as follows:

packages of Uneeda Biscuit are each containing one dozen packages, ut change of condition direct to Na- y, Lincoln, Nebraska, in charge of agent and employee of said National

Biscuit Company, and placed without change of condition into a sales agency or warehouse of the National Biscuit Company, located and operated at Lincoln, Nebraska, and are offered for sale by said Burton T. Page to the retail grocers of Lincoln. In answer to orders given by the retail grocers, Burton T. Page delivers said bundles in the same unbroken and unopened condition as when the same are shipped from the city of New York, in the state of New York, or from the city of Chicago, in the state of Illinois, and received by him, the said Burton T. Page, at Lincoln, Nebraska, as sales agent and employee of said National Biscuit Company, and in no other way."

It may be noted that each package sold contains one dozen smaller packages. The latter are the packages which are sold by the retailers at 5 cents each. Also that Page delivers "said bundles" to the retailer without breaking them. In paragraph 12, which refers to sales by King, it is stipulated that "King purchases, through the said Burton T. Page, Uneeda Biscuit from the National Biscuit Company by the dozen packages, and the said Ornan J. King receives bundles, each containing one dozen packages of Uneeda Biscuit in the same unchanged and unbroken condition as when said bundles left said National Biscuit Company at its factories in the city of New York, in the state of New York, and in the city of Chicago, in the state of Illinois, and said Ornan J. King places said bundles on the shelves and counters of his grocery store as an article of merchandise, so that the said bundle, from the time it was formed in New York or Chicago, trucked to a railroad car, placed in such railroad car, transported in car-load and part car-load lots, placed in the warehouse or sales agency of said National Biscuit Company at Lincoln, in the state of Nebraska, trucked in wagons to the store of the said Ornan J. King, and displayed by the said Ornan J. King on his shelves and counters in said store, has not been changed in any respect whatsoever, or inclosed in or united to, or formed as a part of, any other article of merchandise, bundle or box, or parcel of any kind or descrip-

tion, but is in said Ornan J. King's store in the same condition as when formed in bundles in said factories of said National Biscuit Company and shipped by it as an article of commerce to Lincoln, in the state of Nebraska, and as received by said Ornan J. King in his said retail grocery store at Lincoln, in the state of Nebraska." This paragraph is misleading, wherein it is sought to show that the bundles purchased by King are the original packages shipped from the factories in New York and Chicago, which clearly they are not. But it is shown that the purchases are by the dozen packages, which are the 5-cent packages. In paragraph 16 it is stated that the packages "have printed thereon the price of each, and are sold by the National Biscuit Company to the dealer by the dozen," and resold singly by the dealer. These "dozens" are contained in a square bundle containing one dozen of the 5-cent packages, and, as most clearly appears, they are the bundles which are sold to the retailer by Page. An illustration of this bundle is shown and verifies the above beyond question. But these bundles of dozens are not the original packages shipped from the factories. There are two cuts or illustrations of these original packages, which are presented in the agreed statement, and they each contain more than one of the "dozen" packages.

At the argument of the cases before the bar of this court, certain exhibits, presumably those referred to in the twenty-fifth paragraph of the stipulation, showing the manner in which the goods were packed and shipped, were presented, and explanations of how they were sold by Page were given, which, of course, constituted a part of the evidence upon which this decision must be made. As then elucidated, and taken in connection with the stipulation of facts, it appears beyond question that Page receives the consignment of goods in paper-board cases containing two or more bundles or receptacles, each containing one dozen small 5-cent packages, on neither of which is there any brand showing their

In re Agnew.

contents by weight or measure. These bundles, containing one dozen other packages yet smaller in size, are removed and sold to the retailer, who in turn sells the 5-cent packages to the consumer. From this it appears that the goods are not sold to the retailer in the original package, as shipped from the factory, and therefore the sales are not protected by the interstate commerce law. Our attention is directed to a portion of paragraph 26 of the stipulation which refers to a specific sale made by Page to a person therein named, and which is within itself contradictory. It is said that Page sold to the person named "one large package, described in paragraph 15 of this stipulation as a bundle, containing 12 small packages" of Uneeda Biscuit, etc. We have been advised of but one style of package containing "12 small packages," and that one contains 12 of the 5-cent packages. When we turn to paragraph 15 and observe the package there illustrated, we find a receptacle containing more than 24 of the "small packages" and which is certainly not the bundle containing "12 small packages," so frequently referred to in the stipulation, arguments and briefs.

It is fundamental that in a proceeding of this kind it devolves upon plaintiff (Page) to show that his detention is unlawful. This he has failed to do. His petition is dismissed, and he is remanded to the custody of the sheriff of Lancaster county.

WRIT DENIED.

FAWCETT and ROSE, JJ., not sitting.

IN RE LEW AGNEW.

FILED MAY 23, 1911. No. 16,957.

1. **Commerce: INTERSTATE AND INTRASTATE.** An original package as governed by interstate commerce law is that which is delivered by the importer to the carrier at the initial point of shipment, and retains its form and contents until received by the consignee in the same condition as when shipped. If, upon arriving at its

In re Agnew.

destination in a foreign state, the package is broken and its contents, in smaller units, is offered for sale, and enters into the retail commerce of the state, the distinctive quality of interstate commerce is lost, and the goods become at once subject to state laws.

2. ———: ———. The laws of congress governing and controlling interstate commerce can have effect upon property only during the time it retains its distinctive interstate quality, or character, of commerce. When such property is shipped to and enters the body of the property of the state, the original packages being broken and the contents offered and sold to retailers or consumers, its interstate quality is lost and it ceases to be subject to congressional control.
3. **Food: PURE FOOD LAW: CONSTITUTIONALITY.** A law of this state requiring packages containing articles of food to be branded with a statement of the net contents by weight when offered for sale in the retail trade imposes no obligation upon the manufacturer in a foreign state. The requirement operates alone upon the dealer who is selling the product at retail as a part of the body of the property of the state and exclusively under state control.
4. ———: ———: ———. The pure food law of this state (Comp. St., 1909, ch. 33) is confined to the regulation of intrastate commerce, and does not in any sense pretend to control interstate commerce. If, however, some of its provisions should be found to encroach upon the regulation of interstate commerce, that fact would not necessarily require the whole act to be declared void.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

John Lee Webster and Earl D. Babst, for petitioner.

Grant G. Martin, Attorney General, George W. Ayres and F. M. Tyrrell, contra.

REESE, C. J.

This is an original application by Lew Agnew, whom we will designate as plaintiff, for a writ of habeas corpus. The petition is of unusual length and cannot be set out here in full. It must be sufficient to state that it is alleged therein that a complaint was filed in the office of the county judge of Pawnee county charging plaintiff with a violation of the

In re Agnew.

pure food laws of this state in the sale of a misbranded package of food known as "Uneeda Biscuit," the same being a wheat product, which had not been put up in package form by any retailer, the misbranding consisting of a failure to have placed upon said package a correct statement of the net weight or measure of the contents of the package; that a warrant was thereupon issued by the county judge and placed in the hands of the respondent, the sheriff of Pawnee county, who arrested plaintiff, and was holding him in custody, thus restraining him of his liberty, which, it is alleged, is in violation of law. The writ was issued, directed to the sheriff of said county, who has made his return setting up copies of the complaint and the warrant for the arrest of plaintiff thereunder, the arrest and custody as his justification.

The prosecution of plaintiff was instituted under the provisions of chapter 33, Comp. St. 1909, the sections of which, applicable to this case, are sections 8, 22, and 23 of the chapter. Sections 22 and 23 provide the penalty to be imposed for violations of the act, and section 8 defines misbranding, and declares that the failure to state upon a package of food, of the kind specified, the net weight or measure of the contents of the package, exclusive of the container, shall be misbranding.

It seems to be conceded that plaintiff has violated the provisions of the law, provided the law is constitutional and valid, but it is contended that the act of the legislature, and especially section 8 thereof, is unconstitutional and void, as being in derogation of the law of congress, and violative of the constitution of the United States, and therefore the detention of plaintiff is without warrant or authority of law, and is, for that reason, illegal.

The questions involved were argued at considerable length at the bar of the court, and the cause has been submitted thereon and upon extended briefs by plaintiff and the attorney general. It will be impossible for us to consider all the propositions presented by plaintiff without extending this opinion to an unreasonable length. Indeed,

there are many subjects discussed which we are unable to see have any bearing upon the merits of the case. The cause is submitted upon an alleged agreed statement of the facts supposed to be material to this inquiry, much of which is, as we believe, wholly outside of the legal propositions involved.

As we view the case, it is deemed sufficient to say that the article, the sale of which forms the basis of plaintiff's arrest, was, and is, manufactured by a corporation known as the National Biscuit Company, with its factories in New York and Chicago, the product being put up in small boxes or packages, the retail price of which is 5 cents a package. These packages are packed in larger receptacles containing one dozen of the smaller ones, and those receptacles in turn are shipped from the factory in yet larger bundles or containers to the points of distribution in the various states. The product handled by plaintiff in his retail trade is shipped to him from a distributing agency at St. Joseph, Missouri, encased in the larger bundle, which he receives, opens, and from which he removes the smaller bundles and places them upon his shelves, but from which he removes the small 5-cent packages, and these he offers for sale in his regular retail trade, singly or in numbers to suit his customers. This it is claimed is interstate commerce, and all jurisdiction or authority over it by the state and state laws is prohibited by the clause of the constitution of the United States (article I, sec. 8) which provides: "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with Indian tribes." It is claimed that the manufacture, shipping and sale of the Uneda biscuits is interstate commerce, and that the characteristic or distinctive quality of such commerce follows the product into the states and into the hands of the retail dealer. We apprehend that, under the decisions of the federal supreme, subordinate and state courts the shipment of the products of the factories in New York and Chicago into the different states of the Union, other

In re Agnew.

than New York and Illinois, does constitute interstate commerce, and the regulation of that traffic rests with congress. But we are not willing to concede that, when such goods are shipped into this state in packages containing many small units of the product, and after they enter the state such packages are broken and their contents sold by retailers by the smallest unit to the consumer in the ordinary retail trade, they retain their quality of interstate commerce. If this were true, the only condition necessary to protect the retailer from a violation of state laws would be that the goods which he sells, no matter how remote from the manufacturer by mesne sales and transfers, shall have been manufactured in another state and shipped therefrom into this state. It never was the purpose of the provision of the constitution under consideration to thus protect violators of state laws by following the articles throughout the ramifications of the intrastate commerce and trade with the interstate quality. Whatever may have been the character of the commerce before the breaking of bulk and entry of the product into the general commerce of the state, that distinctive character or quality of interstate commerce is lost, and the product becomes subject to state regulation and control, upon the happening of that event, and neither the constitution nor any law of congress can have any authority or control over it to the exclusion of the power of the state. In short, it becomes a part of the domestic commerce of the state and subject to its laws. *May v. New Orleans*, 178 U. S. 496; *McGregor v. Cone*, 104 Ia. 465; *Smith v. State*, 54 Ark. 248; *Kimmell v. State*, 104 Tenn. 184; *Croy v. Obion County*, 104 Tenn. 525; *Austin v. State*, 101 Tenn. 563, affirmed, *Austin v. Tennessee*, 179 U. S. 343; *In re Harmon*, 43 Fed. 372; 6 Words and Phrases, p. 5059, and cases there cited; *Halcy v. State*, 42 Neb. 556; *Parks Bros. & Co. v. Nez Perce County*, 13 Idaho, 298, annotated in 12 Am. & Eng. Ann. Cases, p. 1116.

It is contended that since congress has enacted a pure food law and has provided against misbranding of food, subject to interstate commerce regulation, the state is

thereby deprived of power to enact laws upon a similar subject. In the act of congress, approved June 30, 1906, 34 U. S. St. at Large, pt. 1, ch. 3915, p. 770, it is provided that, if packages are branded, the brand shall state the truth, but there seems to be no provision requiring interstate commerce packages or parcels to be branded at all. Many cases are cited from which it is contended that the law is settled that if congress takes any action upon the subject of the kind that fact excludes the states from enacting any law thereon. It is perhaps true that, where the state law in any degree impinges upon the subject of interstate commerce, such acts are void in so far as that commerce is concerned. But we are persuaded that that question cannot arise here, as the subject in hand does not involve any consideration of interstate commerce. The bundles or original packages having been broken after their delivery to the consignee within this state, it has entirely lost its distinctive interstate quality, and has become subject alone to the jurisdiction of the state, and an act or law of congress can follow it no further. If the state should see proper, as in this case, to enact laws for the purpose of protecting its citizens against fraud or deception in weights or quantities in the matter of the *sale* of such goods as are clearly within its exclusive jurisdiction, we are wholly unable to see by what right or authority congress can interfere. Indeed, as this conclusion appears so reasonable and sensible, we decline to pursue the subject further, except to say that we do not think the cases cited by plaintiff hold otherwise. The grant of the constitution to congress does not and cannot reach so far as to prohibit the states from the protection of their citizens against fraud in the sale of property, over which they alone have jurisdiction, to their own people.

The argument that because it would be quite inconvenient to brand the packages with the net weight of the contents the law should be held bad cannot be considered as an objection to the validity of the law itself, but might with greater propriety be directed to the legislature, should it

be thought of sufficient importance to require attention. In this connection it is urged that by the law of this state an attempt is made to control the manufacturer in New York and Chicago in its methods of manufacture and shipments. No such effort is made. We find nothing in the law requiring that the manufacturer should brand. The only purpose is to reach the seller within this state, and it is wholly immaterial by whom the brand is affixed. If the seller desires to handle the goods, he must see that the law is obeyed in his sale.

It is further contended, in effect, that the law of this state does not seek to confine its provisions to intrastate commerce, but that its provisions can as well include interstate commerce, and also, as some of its provisions may include forbidden legislation, the whole act must be held void, but particularly the eighth section. As to the former contention, we deem it sufficient to say that we find no ground or authority for holding that the act is intended to apply to anything but the commerce within the state and to commodities being sold within its well-known jurisdiction. As to the latter, we have not sought to ascertain if other provisions within the act may or may not be objectionable as beyond the power of the state, for the reason that such investigation would be wholly unnecessary. If some provision should be found which is violative of the constitution, that fact would not necessarily render the whole act void. In 36 Cyc. 983, it is said in the text: "The weight of authority is to the effect that, where a state statute is primarily intended to regulate domestic commerce, it will be sustained so far as it relates to such commerce, although it contains clauses invalid as attempting to regulate interstate commerce"—citing a number of authorities in the note. See, also, *Standard Oil Co. v. State*, 117 Tenn. 618; *Austin v. State*, 101 Tenn. 563; *State v. Lancaster County*, 6 Neb. 474; *State v. Lancaster County*, 17 Neb. 85; 3 Neb. Syn. Digest, p. 2964.

Other questions are presented in the brief of plaintiff, but none of which is believed to be vital to a proper de-

Coffman v. State.

cision of this case, and this opinion will not be further extended.

It follows that plaintiff's petition must be dismissed and he be remanded to the custody of the sheriff of Pawnee county, which is done. Petition dismissed, and plaintiff remanded to custody.

WRIT DENIED.

FAWCETT and ROSE, JJ., not sitting.

WILLIAM COFFMAN V. STATE OF NEBRASKA.

FILED MAY 23, 1911. No. 17,011.

1. **Criminal Law: INSTRUCTIONS: REVERSAL.** Where an instruction to a jury is requested by a defendant on trial, and is given by the court in the language as requested, the giving of the instruction, even if erroneous, will not, as a general rule, require the reversal of a judgment.
2. ———: ———: ———. Where an instruction is given by the court upon its own motion, the legal effect of which is practically the same as one given upon the request of the defendant on trial, even if erroneous, a judgment of conviction will not be set aside, unless it clearly appears that the giving of such instruction worked a prejudice to the accused.

ERROR to the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed. Sentence reduced.*

Oliver G. Leidigh, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

REESE, C. J.

An information was filed in the district court for Otoe county by the county attorney charging plaintiff in error with the crime of burglary and larceny by breaking and

entering a barn in the night-time and stealing a saddle. The trial resulted in a verdict finding plaintiff in error guilty of burglary, and he was sentenced to a term in the penitentiary. He presents the case to this court for review by proceedings in error.

The cause was tried throughout upon the theory that it was necessary to charge and prove that the breaking and entering occurred in the night season; the court so instructing the jury. It is apparent that both court and counsel overlooked the change in the statute by the act of 1905, by which the phrase "in the night season" was eliminated. This, however, could work no prejudice to plaintiff in error, and need not be further noticed. *Schultz v. State*, 88 Neb. 613.

Soon after the discovery of the alleged burglary and larceny, plaintiff in error was apprehended in South Omaha at a pawnshop, where he sought to sell the saddle alleged to have been stolen, when he was returned to the Otoe county jail and there confined until the time of his trial. The length of his imprisonment was from about the 1st day of April until the 1st day of June, of the year 1910.

On the trial the sheriff of Otoe county was called as a witness on the part of the state. We copy his testimony bearing on the question in hand. Questioned by the county attorney: "Q. Do you know the defendant William Coffman? A. Yes, sir. Q. Have you at any time since the filing of the complaint in the first instance had any conversation with him about this saddle? A. Yes, sir. Q. Can you state to the court when that was? A. Well, I couldn't state exactly. It was the day we had Oram the last time—the judge was down here. Q. Where was it you had this conversation with him? A. Down in jail. Q. You may state to the jury what he said at that time. A. Why, he said he would come up and plead guilty that he took the saddle, but he wouldn't plead guilty to breaking the place in. I told him he had better not do anything like that. He had better consult with his attorney." This was the whole of the testimony in chief upon this subject. The

Coffman v. State.

cross-examination was as follows: "Q. Mr. Fischer, it was along about the first of April when he was arrested and put in jail? A. Something like that. Q. He has been in jail ever since, hasn't he? A. Yes, sir. Q. At that time from his general line of talk, didn't he seem to understand that he would have to stay in jail possibly until fall for trial? A. No; I think not. He was just anxious to have his hearing and get through with it. Q. Did he say at that time, Mr. Fischer, to get this over he would plead guilty to taking the saddle? A. To get this over? Q. Yes, sir; at the time Oram came up for hearing, pleaded guilty, and was released on probation? A. Yes, sir; he did. Q. He said he wouldn't plead guilty to the burglary? A. He said he wouldn't plead guilty to the breaking, but he would plead guilty to taking the saddle." This was all the evidence upon that subject.

Upon this part of the case the court gave the following instructions: No. 9. "You are instructed that the evidence purporting to show an admission by the accused is admitted for the purpose of connecting the accused with the offense, and you cannot convict the accused of a felony upon his own unsupported admission of guilt, but such admission must be corroborated by other competent testimony sufficient to prove that a crime was committed and that the accused is guilty of the offense beyond a reasonable doubt." No. 15. "The jury are instructed that, if from the evidence they believe the defendant made the confession given in evidence in this case, the jury should consider such confession precisely as they would any other evidence or testimony. The jury are at liberty to judge of it like other evidence, in the light of the circumstances as disclosed by the evidence, but a confession alone is not sufficient evidence that a crime is committed. There should be other proof that the property was stolen. The confession is admitted for the purpose of connecting the defendant with the offense."

In view of the evidence above quoted, neither one of the foregoing instructions could receive the unqualified ap-

proval of this court, but the record shows that instruction No. 9, given by the court, is identical with No. 15 of those requested by plaintiff in error. The rule is well settled that a party will not be heard to allege error in the giving of an instruction which he has himself requested.

In considering instruction No. 15, given by the court upon its own motion, in which the word "confession" was used, it is the opinion of a majority of the court that the effect of this instruction could not be treated as prejudicially erroneous, since in legal effect it is not materially different from the one given upon the request of plaintiff in error.

While the evidence is held sufficient to support the verdict of guilty of the burglary, it must be conceded that it is not so direct and clear as to the act of "breaking" into a barn as might be. As to the stealing of the saddle, the evidence is sufficient, aside from plaintiff in error's statement to the sheriff, to establish his guilt. The evidence as to the value of the saddle varied from \$20 to \$40. It might be doubted whether the evidence is sufficient to show that the theft of the saddle alone would constitute a felony, but upon the whole record we cannot say that the judgment of conviction should be reversed. The penalty imposed was imprisonment in the penitentiary for two years. Upon consideration of the whole case, it is the unanimous opinion of the members of the court that the term of imprisonment is greater by one year than should have been imposed, and, to that extent, is excessive.

The sentence and judgment of the court will therefore be modified to that extent, leaving the term of imprisonment stand for one year.

As thus modified, the judgment is

AFFIRMED.

ROOT, J., concurs in the conclusion.

FLORA HACKER ET AL., APPELLANTS, V. FREDERICK E.
HOOVER, APPELLEE.

FILED MAY 23, 1911. No. 16,452.

1. **Deeds: VALIDITY: MENTAL CAPACITY.** In determining the mental capacity of a grantor to execute a deed, if it clearly appears that when the deed was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, what he had done and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument.
2. ———: ———: **UNDUE INFLUENCE: PARENT AND CHILD.** The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.
3. **Evidence examined, and found to require an affirmance of the judgment of the district court.**

APPEAL from the district court for Nemaha county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. B. Quackenbush and C. F. Reavis, for appellants.

H. A. Lambert, Kelligar & Ferneau and Stull & Hawaby, contra.

BARNES, J.

Action to set aside a deed to 156 acres of land situated in Nemaha county, Nebraska, made to the defendant, Frederick E. Hoover, by his mother, Harriet Hoover, executed, acknowledged and delivered on the 24th day of October, 1898. The defendant had the judgment, and the plaintiffs have appealed.

It appears, without question, that Harriet Hoover, who was a widow about 68 years of age, on the 14th day of July,

1898, made, executed and delivered to her son, the defendant herein, a deed to the land in question, which contained a reservation in the nature of a life lease; that in October following she saw a statement in a newspaper to the effect that such a deed had been declared void, and that immediately thereafter she went to the office of the county judge of that county, called his attention to the newspaper article, and insisted on executing the deed in question. At the same time she required the defendant to execute and deliver to her a life lease of the premises by another instrument, thus protecting herself from any loss of her means of support during the remainder of her life.

It further appears, without dispute, that Mrs. Hoover and her husband purchased the land in question as early as the year 1857, and took title thereto in her name; that Doctor Hoover died, leaving her a widow with four children, in 1876; that from that time until her death, with some short intervals, she together with her family, including the plaintiffs, made this land their home until the early spring of 1898; that she permitted the defendant and his brother Edward (who died some years ago), together with the plaintiffs, to farm certain portions of the homestead and take the proceeds thereof for themselves, with the exception of her own support and maintenance, which seems to have been furnished to her by the defendant; that when the plaintiff, Mrs. Hacker, married the first time, she brought her husband, whose name was Bucheneau, to the family home, where they remained for some time before they left for a home of their own elsewhere; that Bucheneau was a man of profligate and dissipated habits, and his wife procured a divorce from him, when she and her three small children returned to the family home, where her children were raised and practically educated by the bounty of their grandmother, which came from the proceeds of the farm; that this state of affairs continued until after Mrs. Hacker married her present husband. It also appears that, in the year 1879, Hattie Hoover, the other daughter of the grantor, married one Linder Bradfield, who seems to have

been a person without property, and brought him to live at the family home; that thereafter, and until the early spring of 1898, Bradfield farmed that portion of the premises, the use of which was claimed by his wife and Mrs. Hacker; that his conduct was not satisfactory to Mrs. Hoover, and especially so much of it as related to his selling a span of horses claimed by his wife. This seems to have caused Mrs. Hoover to serve a notice upon him to quit the premises, and, as he desired and was about to move to Oklahoma, an arrangement was perfected by Attorney Cornell, acting for the Bradfields, by which they claimed and took away from the premises about \$1,500 worth of personal property, leaving to Mrs. Hoover very little, if anything, of value, except the farm. In this trouble Mrs. Hacker took sides with her sister, Mrs. Bradfield, and this so incensed their mother, and she was so impressed with what she thought was the injustice of the transaction, that she declared to them that, if they persisted in depriving her of her property in that manner, it was all that they would ever get. This was in May, 1898, and in October following the deed in question was executed.

To reverse the judgment of the district court, the plaintiffs contend: First, that Mrs. Hoover was incompetent by reason of her mental condition to execute the deed in question; second, that the deed was procured by the undue influence of the defendant.

As to the first question, the plaintiffs attempted to show that their mother was an habitual user of opium, and that by its excessive use she had so weakened her mental faculties that she was incapable of transacting any business and was mentally incompetent to make the conveyance. It appears that Mrs. Hoover was in the habit of taking small quantities of gum opium from time to time during most of her life; but, notwithstanding the evidence produced by the plaintiffs, it seems clear that the amount which she took was so small that it did not affect her mental capacity to any extent whatever. Doctor Bell Andrews, who was the family physician, and who testified most strongly

Hacker v. Hoover.

against her competency, said that he did not think she took opium in sufficient quantities to have affected her mind. It also appears beyond question that for months at a time she voluntarily quit taking the drug, and did not use it at all at her death. This shows that it had little, if any, effect upon her. She was not in any sense an opium fiend, and her health up to a short time before her death was good. Mrs. Hacker testified that her mother was a rugged woman up to the time of her first stroke of paralysis, which was in 1900, and about two years after the deed in question was made. The most complete proof of her perfect sanity and her competency to transact business is Mrs. Hoover's own testimony, taken in April, 1905, which was nearly seven years after making the deed, and after she had suffered one paralytic stroke. This testimony is intelligent and coherent, and is a consistent statement of the transaction. It clearly appears therefrom that she knew all about her property, where she got it, how long she had had it, how it had been managed, and what she had done with it. It also shows that she had a remarkable strength of will of her own, and she possessed the ability to answer all questions put to her on her cross-examination clearly and intelligently. She appears to have quickly caught the object and purpose of the attorney in putting the questions to her. In short, her evidence discloses that she was a woman of intelligence; that she possessed great clearness of mind and memory, which was remarkable in a woman of her age. From her own testimony and the testimony of her friends and neighbors covering many years, including the year in which the deeds above mentioned were made, we are satisfied that she was a woman of sound mind, perfectly competent to execute the deeds at the time she did; that she had no delusions whatever, and, while she felt that perhaps she was not doing what her friends and neighbors expected her to do, nevertheless she was determined to do it. She knew what property the plaintiffs had taken, and that they had not had any part of the farm, and she was not laboring under any delusion on that subject. She says

she told her daughters at the time of the settlement in the spring of 1898 that if they took the property which they did take they would never get anything more. As above stated the evidence shows that she was capable of taking care of herself. She did not deprive herself of the use of her property, as is usual in such cases, but took a life lease on it, and thereby retained its use as certainly as if the deed had not been made. It appears that she had no intention of letting the defendant beat her out of this property, or of depending alone upon him for her support. There was nothing improvident in her conduct, and we are satisfied that the district court correctly held that she was competent to make the deeds at the time she made them, and remained so from that time until her death.

Plaintiffs' second contention presents a more difficult question for our determination. Ordinarily a deed or gift from a parent to a child does not raise a presumption of undue influence; but in the instant case the circumstances and the relations between Mrs. Hoover and her son, who is the defendant, were of such a nature that, taken with her disposition of the property, seem to require him to assume the burden of proving that the making of the deed in question was not caused by any undue influence on his part. *Gibson v. Hammang*, 63 Neb. 349. The law, however, is well settled that if the grantor was competent to convey, and the conveyance was her voluntary act and deed, it is valid, no matter how inequitable it may appear to the court. In this case the land was Mrs. Hoover's, and, if she acted freely and intelligently in the matter of disposing of it, she could do with it as she pleased. Therefore the only remaining question is: Did the defendant have such influence over his mother that he induced her to deed the property to him against her real wish and desire, and contrary to what she would have done if he had not abused her confidence by using his influence to induce her to convey to him what she really desired to divide between all of her children alike?

The mere fact that she gave him the property is not

Hacker v. Hoover.

sufficient to prove undue influence. She had the right to do that if she really desired that he should have it in preference to the others. The most that can be said for the evidence on the part of the plaintiffs is that it shows the defendant had a desire to have the property and he had an opportunity to use his influence in order to get it. There is no direct evidence, however, that he did so use his influence at any time, and the plaintiffs' case in that respect rests upon circumstantial evidence alone. As opposed to this, we have the testimony of the grantor herself, taken and perpetuated as provided by law, from which it appears that she knew better than any one else why she made the deed. She testified positively and without equivocation that she was not persuaded or induced by any person whomsoever to make the deed; that she did it of her own free good-will, and this was stated repeatedly, and her evidence is fully supported by the testimony of the defendant. She stated clearly when she made the deed and why she made it; that it was done after long and careful deliberation. She says that she talked the matter over with the defendant, and that he did not say anything one way or the other, but she supposed, like any one else, that he was willing to take the farm; that he would be a fool if he would not. It seems clear from the evidence that the trouble arose out of the settlement above mentioned which was made between Hattie Bradfield and her mother in the spring of 1898. The old lady believed that the daughter had wronged her in that transaction; that Mrs. Bradfield had taken too much personal property, and that she had been left destitute. It is apparent that she had some trouble with her son-in-law; that she did not like him; and this trouble had something to do with her making the deed. It may be true that Mrs. Bradfield did not take any more than she was entitled to, and that Mrs. Hacker did not get anything except the bounty which had theretofore been provided by her mother in rearing and educating her family of small children; but Mrs. Hoover knew just what they got, what they had theretofore had, and believed,

Hacker v. Hoover.

up to the time of her death, that they were getting in that settlement what they were not entitled to. She said on her cross-examination in answer to the question: "Q. What did you say to them, and what did you do with reference to keeping them from taking this stuff you speak of? A. I told them if they took it they would never get anything more, that's what I told them." Whether her action was right or wrong is not a question for us to decide. The court is not the keeper of her conscience. The question for us to determine is whether she acted freely and voluntarily in the matter. If she did, her action was final and is binding upon the court, no matter what we may think of its justice or equity. The evidence satisfies us that Mrs. Hoover was a much stronger character than her son Fred, and there is very little likelihood of his having influenced her against her will. We are of opinion he could have only done so by actual fraud or falsehood, and upon those questions there is no evidence in the record. The fact that the defendant had the opportunity and probably the desire to influence his mother to make the deed is not sufficient to overcome her direct and positive testimony that he did not so influence her or attempt to do so, but that she acted of her own free will and accord in the matter. Where the evidence clearly shows competency and perfect freedom on the part of a grantor in making a deed, the court will not be justified in setting it aside. *Sawyer v. White*, 122 Fed. 223; *Schley v. Horan*, 82 Neb. 704; *Fjone v. Fjone*, 16 N. Dak. 100.

From a careful consideration of all of the evidence, we conclude that the trial court did not err in holding the deed in question valid. There is contained in the briefs some discussion of the statute of limitations, but our conclusions, as above stated, render it unnecessary to consider that question. We are of opinion that the judgment of the district court was right, and it is therefore

AFFIRMED.

**CLARK SUMMERS, APPELLEE, v. WILLIAM CHISHOLM ET AL.,
APPELLANTS.**

FILED MAY 23, 1911. No. 16,462.

1. **Justice of the Peace: APPEAL: TRANSCRIPT: AMENDMENT.** Where an appeal has been taken from a justice court to the district court, and it clearly appears that in preparing the transcript the justice has inadvertently omitted a portion of the proceedings in his court, or has failed to include or mention a paper filed therein, the district court may, in the furtherance of justice, permit the transcript to be amended or the missing paper supplied, and it would be error to refuse such permission.
2. ———: ———: **PLEADING.** In making up the issues in the district court, it is proper for the plaintiff to file a reply denying the allegations of the defendants' answer, and, if the identity of the cause of action tried in the justice court has been preserved by the petition and answer, the filing of a reply does not change the issues.
3. **New Trial, Motion for: TIME.** The statute requiring a written motion for a new trial to be made at the term at which the verdict was rendered and within three days after its rendition, except for newly discovered evidence, is mandatory, and, if the motion is afterwards made, it is of no avail to the party filing it.
4. **Appeal: MOTION FOR NEW TRIAL.** Unless a motion for a new trial is filed within three days after the verdict or decision, this court cannot examine any errors which it is alleged occurred at the trial; and in such case the only question which can be considered by this court is whether the pleadings are sufficient to sustain the judgment.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

A. M. Morrissey and Allen G. Fisher, for appellants.

Albert W. Crites, contra.

BARNES, J.

This action was commenced in justice court of Dawes county to recover damages for or on account of an al-

leged breach of warranty of a gasoline engine sold and delivered by the defendants to the plaintiff. On the trial in that court the defendants had the verdict and judgment. Upon a trial on appeal to the district court the plaintiff had judgment, and the defendants have appealed.

It appears that, immediately after judgment was rendered by the justice of the peace, the plaintiff filed an appeal bond, which was approved, and in due time a transcript of the judgment was filed in the office of the clerk of the district court for the purpose of perfecting an appeal. It also appears that in making the transcript the justice failed to include his docket entry of the filing and approval of the appeal bond; but that document was duly transmitted to the clerk of the district court, and a copy of it appears in the transcript filed in this court. When the defect in the justice's transcript was discovered, defendants moved to strike it from the files, and the plaintiff thereupon suggested a diminution of the record. Leave was granted by the district court to file an additional transcript in order to supply the omission above mentioned, which was accordingly done, and the motion to strike and dismiss the appeal was overruled. This ruling is assigned as error.

Where it clearly appears that in preparing a transcript the justice of the peace has inadvertently omitted a portion of the proceedings in his court, or has failed to include or mention a paper filed therein, the district court to which an appeal has been taken may, in the furtherance of justice, permit the transcript to be amended or the missing paper supplied, and it would be error to refuse such permission.

It further appears that, after defendants filed their answer to the plaintiff's petition in the district court, plaintiff filed a reply which was a general denial of the matters contained in the answer. Defendants thereupon moved to strike the reply from the files because of an alleged change of issues. The motion was overruled, and for that ruling defendants also assign error. The record discloses that

the petition in the district court was founded on the identical cause of action set forth in plaintiff's bill of particulars in the justice court. It is true that the petition is not couched in the same words as was the bill of particulars, and that its statements are somewhat amplified. This, however, is allowable in pleadings in the district court, and, if the identity of the cause of action is preserved, there can be no cause of complaint on that score.

After the answer was filed in the district court, it then became necessary for the plaintiff to reply; otherwise, under the provisions of section 134 of the code, the allegations of the answer would stand admitted, and defendants would be entitled to a judgment on the pleadings. While a reply to the defendants' answer or bill of particulars is not required in justice court, it does not follow that no reply can be filed in the district court. On the contrary, where the issues in the district court are made up in appeal cases, they should be framed under the rules of pleading in force in that court. The motion to strike the reply was therefore properly overruled.

Finally, it conclusively appears from the record that the trial in the district court was concluded, the verdict was returned, and judgment thereon was rendered on the 19th day of June, 1909. No written motion for a new trial was filed until the 25th day of that month, some six days after verdict and judgment. The motion was not based on the ground of newly discovered evidence, and therefore was not filed in time. It follows that the only question left for our consideration is: Are the pleadings sufficient to sustain the judgment. It is true that the judgment recites that a motion for a new trial was overruled, but this must have been an oral motion, or an oral notice of a motion for a new trial, for the record discloses that no motion was in fact filed until six days after final judgment was rendered. We are not at liberty to dispute the verity of the record. A motion for a new trial must be in writing, and must also be filed within three days after the return of the verdict or the rendition of the judgment in the district court; other-

Cowles v. Cowles.

wise, it cannot be considered. In *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587, it was held that a motion for a new trial must be in writing, and must specify causes therefor which are sufficient in law to authorize the granting of the same. An oral motion or one in writing in which no cause or causes for a new trial are assigned, will not justify the granting of a new trial. Nor will the overruling of such a motion be sufficient to present errors of law to either the trial or reviewing court. This rule was followed and approved in *Cedar County v. Goetz*, 3 Neb. (Unof.) 172.

From an examination of the record, it appears that the pleadings are sufficient to sustain the judgment, and for the foregoing reasons the judgment of the district court is

AFFIRMED.

EDWARD B. COWLES, APPELLEE, v. HARRIET COWLES, APPELLANT.

FILED MAY 23, 1911. No. 16,470.

1. **Trusts: DEVISE OF LANDS HELD IN TRUST.** Where one person buys real estate paying the purchase price thereof, and for convenience the title is taken in the name of another, the person so taking the title will hold the property in trust for the person paying the purchase price; and if the trustee, at the request of the owner, devises the property to another for the same purpose, the trust relation follows the property and the devisee also holds it in trust for such owner.
2. ———: ———: **RELIEF IN EQUITY.** Where the real estate thus conveyed is not the subject of fraudulent alienation, the fact that the title was taken in the name of another to avoid the payment of a judgment does not estop the owner from maintaining an action in equity to recover the title thereof.
3. **Evidence examined, and found sufficient to sustain the judgment of the district court.**

APPEAL from the district court for Jefferson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Wolfner, Healy & Young and Heasty, Barnes & Rain,
for appellant.

O. H. Denney, contra.

BARNES, J.

This action was commenced in the district court for Jefferson county by Edward B. Cowles, hereafter called the plaintiff, to obtain a decree declaring him to be the owner in fee of the west half of the northeast quarter and the east half of the northwest quarter of section 6, township 3, north of range 3 east, situated in said county, and quiet his title thereto. Service was had upon the defendant, who at that time was in Chicago, Illinois, and, owing to illness, she failed to appear in time and the plaintiff had a default decree. Thereafter she filed a petition to open the decree, which was sustained, and upon issues joined a trial of the case was had upon its merits, which resulted in a second decree for the plaintiff, and the defendant has appealed.

Appellant assigns three reasons for a reversal of the decree. First, because the plaintiff failed to establish any trust; second, the petitioner did not come into court with clean hands; third, the plaintiff has always recognized the title of the defendant, and hence there could be no adverse possession.

Upon reading the evidence we find that on the 7th day of May, 1872, plaintiff purchased the land in question by contract from the Burlington & Missouri River Railroad Company and paid one-tenth of the purchase price in cash; that he thereafter, from time to time, made the deferred payments, and therefore we find that plaintiff paid the full purchase price of the land. We further find that at the time of his purchase he took possession of the premises, and that such possession has been continuous and uninterrupted to the present time; that he placed valuable improvements upon the land, including a dwelling house,

barn and other suitable buildings, and made it his home; that in 1873 he brought his father and mother from their former home in Michigan, and that they thereafter lived with him upon the premises as one family until the death of his father, which occurred shortly thereafter; that he also brought the other members of his family, including the defendant, and installed them in the family home, and that the farm in question was considered the home of the entire family, of which the plaintiff appears to have been the head. We further find that the plaintiff has paid all of the taxes assessed against the premises from the date of its purchase to the present time, and has paid for all of the improvements made thereon; that he has collected all of the rents and profits, out of which he has maintained the family, including the defendant, for a considerable portion of the time, and especially for two or three years while she was an invalid and unable to care for herself. We further find that at the time of the final payment to the railroad company the defendant assigned the contract of purchase to his mother, Helen H. Cowles, and requested the company to make a deed of the land to her. It appears that this was done in order to avoid the payment of a judgment, which had previously been rendered against the plaintiff, and which he claims to be unjust and invalid by reason of his having previously paid the debt upon which the judgment was founded; that thereafter, and at the plaintiff's request, his mother made a will devising the land in question to the defendant. The evidence shows without dispute that the defendant never claimed any interest in the land, but always recognized it as belonging to her brother, until about the time this action was commenced; that she told several persons, among whom was the plaintiff's wife, that she had no interest in the land; that it belonged to the plaintiff. This was before the plaintiff's marriage, and the defendant informed his prospective wife that as soon as the marriage took place she would deed the land to her. It is not claimed that the defendant ever had any pecuniary interest in the land, or that she

ever in any way contributed anything towards the purchase price thereof; that for some reason not disclosed by the record, the defendant, after the plaintiff's marriage, refused to make the deed which she had promised to execute, and, instead of carrying out her agreement, began to assert a claim of ownership thereof. The facts are not in dispute. The defendant offered no testimony to establish her alleged ownership, but relied upon her contentions as above stated.

In disposing of defendant's first contention, it is sufficient to say that the well-established rule in this state is that when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price. *Hoehne v. Breitzkreitz*, 5 Neb. 110; *Chicago, B. & Q. R. Co. v. First Nat. Bank*, 58 Neb. 548; *Kobarg v. Greeder*, 51 Neb. 365; *Detwiler v. Detwiler*, 30 Neb. 338. The undisputed facts of this case are sufficient to establish the trust relation. When, at plaintiff's request, his mother devised the land to the defendant, who is his sister, that trust relation was transmitted to her, and thereafter she held the legal title in trust for the plaintiff.

It is strenuously contended, however, that plaintiff can have no relief in a court of equity because the transaction by which the title to his land was taken in the name of his mother was fraudulent, and therefore he does not come into court with clean hands. There are two reasons why this contention cannot be maintained: First, the defendant, by her pleading, has not challenged the *bona fides* of the transaction, and therefore, strictly speaking, she was not entitled to any relief on that ground; second, it appears from the evidence, and beyond peradventure, that the land in question was, at all times, the homestead of the plaintiff, that he was the head of the family which resided with him thereon. It is therefore clear that this homestead, which was at that time worth less than \$2,000 was not the subject of fraudulent alienation. In *Derby v.*

Weyrich, 8 Neb. 174, it was held: "Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation." It was said in the opinion: "Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it matter of concern to them. The debtor, as to that property, may be considered as without creditors, and he has the right to dispose of it as though he had no creditors." *Schribar v. Platt*, 19 Neb. 631; *Baumann v. Franse*, 37 Neb. 807; *Clark v. Clark*, 21 Neb. 402; *Cutler v. Meeker*, 71 Neb. 732. It would seem clear from the foregoing authorities that plaintiff's second contention cannot be sustained.

Finally, defendant's claim that plaintiff always recognized her title to the premises seems to be wholly unsupported by the testimony. The evidence clearly establishes the fact that, not only the defendant, but every member of the plaintiff's family, of which she was one, always recognized him to be the owner of the land in question. It is shown, without dispute, that defendant always, except a short time prior to the commencement of this action, openly and positively declared that she had no interest in the premises; that it belonged to the plaintiff, and that she intended, as soon as the plaintiff married, to convey it to his wife; that after his marriage she told his wife that she thought it was better for the head of the family to have the title to the land, and that she would convey it to the plaintiff.

Upon the facts of this case, as shown by the evidence, the judgment of the district court was clearly right, and it is therefore

AFFIRMED.

LETTON, J., not sitting.

Barry v. Anderson.

JOHN H. BARRY, APPELLEE, v. FRANK W. ANDERSON, APPELLANT.

FILED MAY 23, 1911. No. 16,416.

Appeal: COLLATERAL EVIDENCE. The receipt or rejection of collateral evidence is largely within the discretion of the trial court, and his rulings in that regard will rarely be disturbed.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

C. H. Slama, for appellant.

Jesse M. Galloway and *J. H. Barry*, contra.

LETTON, J.

The plaintiff, who is an attorney at law, began this action against the defendant to recover the sum of \$200 for legal services. The defendant answered substantially that in 1897 he employed the plaintiff to foreclose certain tax certificates and procure him a good title to a certain tract of land; that plaintiff instituted an action for this purpose, which was prosecuted to final judgment, and afterwards advised him that the title procured was a good and merchantable title; that he paid plaintiff for the services, and, relying on this advice, he sold the land; that the title was afterwards attacked in two certain civil actions, which were the identical actions for which the plaintiff claims payment in this suit, and that plaintiff agreed to act for him in these suits for a nominal charge. He also pleads payment. The reply is virtually a general denial.

The real controversy is whether or not the plaintiff agreed to appear and assist in the defense of the two cases attacking the title for a mere nominal fee, as the defendant testified. The court instructed the jury that, if they found from the evidence that the parties agreed that the plaintiff should render his services for a merely nominal

Barry v. Anderson.

sum, and further believed that the sum of \$25, admitted to be paid by the defendant to plaintiff, was in full payment for such charge, then they should find for the defendant; that if, on the other hand, they did not find from the evidence that the contract or agreement was made as claimed by the defendant, then they should determine from the evidence what was a reasonable compensation for the services rendered, and render their verdict for that sum, not exceeding \$200. The jury found for the plaintiff, and assessed his recovery at the sum of \$75.

The principal error assigned is that the court erred in excluding the original files of the tax foreclosure case begun in 1897, in which the plaintiff acted as defendant's attorney. Defendant argues that these exhibits show that this action was unadvisedly brought, and that the title to the premises procured thereby was defective; the object being to corroborate defendant's testimony by giving a reason for plaintiff agreeing to act for a nominal sum. We think it sufficiently appears from the evidence that the defense of the two actions in which the plaintiff appeared was necessitated by the inconclusive character of the proceedings in the original case, but we fail to see how the defense has in anywise been prejudiced by the exclusion of these exhibits. The controversy is not as to whether the plaintiff was morally bound to appear gratuitously in the latter cases, but it is as to whether or not he did agree to appear and defend for a mere nominal sum. This was a question of fact, which depends upon the weight to be given the testimony. Plaintiff testified that he agreed to serve for a reasonable fee. The proof on his part estimated the value of the services to be from \$400 to \$1,000 for both cases. Defendant testified that he told plaintiff that, if he had conducted the first case properly, the trouble would not have arisen, and that he (defendant) really ought not to pay anything. "He said he must have a little, and I says, 'well, it must be mighty little'"—and that plaintiff then seemed to be satisfied. This dispute is the gist of the case.

In re Estate of Bush.

The excluded evidence was collateral. Perhaps it may have a remote bearing upon the issues involved, but we think that it would throw so little light upon them that it was within the discretion of the court as to whether it should be admitted or not. We have repeatedly said: "The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed." *Young v. Kinney*, 85 Neb. 131; *Fitch v. Martin*, 84 Neb. 745; *Peterson v. Andrews*, 88 Neb. 136. This doctrine is settled in this court.

The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF FAYETTE S. BUSH.

CARL F. BENJAMIN, ADMINISTRATOR DE BONIS NON, APPELLANT, V. GALE BUSH ET AL., APPELLEES.

FILED MAY 23, 1911. No. 16,456.

1. **Wills: SPECIFIC LEGACIES.** A bequest of "All money that I may have in the Omaha National Bank of Omaha, state of Nebraska, except therefrom the sum of fifteen hundred (\$1,500) dollars," which was otherwise disposed of by the will, is a specific legacy. Three other bequests, in form, "I direct that five hundred (500) dollars of said money (hereinbefore referred to in the Omaha National Bank) be paid to my grandson," are also specific legacies.
2. **Executors and Administrators: DISCHARGE OF DUTIES.** "The care, prudence, and judgment which the man of fair average capacity and ability exercises in the transaction of his own business furnishes the standard to govern an administrator in the discharge of his trust duties." *Dundas v. Chrisman*, 25 Neb. 495.
3. ———: **ALLOWANCE FOR COSTS AND ATTORNEY'S FEES.** Where an ancillary administrator expends money for court costs and attorney's fees in good faith in an honest effort to preserve a part of the assets, he is entitled to recover for such expenses if for any sufficient and well-founded reason the claim is settled by a reasonable compromise, even though the action and the compromise were not previously authorized by the county court.

In re Estate of Bush.

4. ———: USE OF MONEY OF ESTATE: INTEREST. "It is a settled principle of law that, where an administrator mingles the funds of the estate with his own and uses them for his own benefit, he is chargeable with interest." *Westover v. Carman's Estate*, 49 Neb. 397.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed with directions.*

Baldrige, De Bord & Fradenburg and Fremont Benjamin, for appellant.

A. S. Churchill and John G. Kuhn, contra.

LETTON, J.

Fayette S. Bush died April 24, 1907, near Los Angeles, California. In his will he made the following provisions: "Fourthly: I give and devise to my son, Ralph E. Bush, of Omaha, State of Nebraska, all those certain lots, pieces or parcels of land situate lying and being in the cities of Omaha and South Omaha, County of Douglas, State of Nebraska, that I might have at the time of my death. Also one half ($\frac{1}{2}$) interest in the life insurance policy I have in the Bankers Life Association of Des Moines, State of Iowa, all money that I may have in the Omaha National Bank of Omaha, State of Nebraska, except therefrom the sum of fifteen hundred (\$1,500) dollars which said sum of fifteen hundred (\$1,500) dollars, in said Omaha National Bank, shall be divided and distributed as hereinafter directed.

"Fifthly: I direct that five hundred (\$500) dollars of said money (hereinbefore referred to in the Omaha National Bank) be paid to my grandson Gale Bush, five hundred (500) dollars to my grandson Eldon Bush, and five hundred (500) dollars to my granddaughter Fay Bush, and the said several sums of five hundred dollars shall be placed in the said Omaha National Bank of Omaha, Nebraska, on interest during the minority of said grandchildren and as each one comes to the age of their ma-

In re Estate of Bush.

jority, the five hundred dollars so placed to each one's credit with the accumulated interest thereon shall be paid to said grandchild.

"Lastly, I hereby nominate and appoint my wife, Effie B. Bush, the executrix of this my last will and testament and it is my wish that she be allowed to act as such executrix without bond, and hereby revoke all former wills by me made."

The money on deposit in the Omaha National Bank was evidenced by a negotiable certificate of deposit which came to the hands of his executrix. Soon after the death of the testator, Nellie Bush, the mother and guardian of the legatees Gale Bush, Eldon Bush, and Fay Bush, who resided with these minor children in the state of Iowa, went to the office of Fremont Benjamin, an attorney at law in Council Bluffs, Iowa. She told him of the death and of the will and legacy. She also said she had no confidence in the executrix, and was afraid that, if she was permitted to retain the money, her children would never receive it. She desired to know if she could not as guardian receive the money. Mr. Benjamin undertook to accomplish this. He thereupon began proceedings for the probate of the will in Douglas county, Nebraska, where certain real estate of deceased was situated, and on its probate procured the appointment of an administrator with the will annexed. He then demanded the money on deposit from the Omaha National Bank, and notified it not to pay it to the California executrix. He next began a suit in equity in the district court for the administrator against the executrix and the Omaha National Bank to recover the money on deposit. The bank appeared and demurred to the petition, and Messrs. Crane & Boucher appeared as attorneys for the executrix and filed a general denial. Pending the proceedings, such correspondence was had with the executrix and her attorneys in California that afterwards at a conference in Omaha between the attorneys Crane & Boucher for the executrix, Mr. E. M. Martin, acting for Ralph E. Bush, and Mr. Benjamin for the administrator, it was agreed

that the certificate of deposit be delivered to the administrator on the payment of their attorney fee of \$50 to Crane & Boucher and of the costs of the case. The action was dismissed as to the bank, and a judgment by consent entered in favor of the administrator and against Effie B. Bush, executrix, for the certificate of deposit. The certificate was then delivered to the administrator, and the money on deposit, which with interest at that time amounted to \$1,981.91, was on the 10th day of January, 1908, paid to him by the bank.

On April 11, 1908, Carl F. Benjamin, administrator, filed his final report in the county court of Douglas county as such administrator, setting forth the facts as to the suit against the executrix and the settlement. He also recited that it was agreed by E. M. Martin, acting for Ralph E. Bush, that there should be paid out of Ralph E. Bush's share \$6.81 on Crane & Boucher's fees and \$6.77 costs of suit; that \$50 had been paid to Crane & Boucher as attorney fees, \$48.40 court costs and expenses, and \$468.43 to Ralph E. Bush, leaving \$1,414.08 in his hands. He asked for an allowance of \$62.50 statutory fee from the \$1,500 devised the minors. He also asked for a reasonable attorney's fee to be paid Fremont Benjamin for services as attorney. Objections were filed to this report by Nellie Bush, as guardian of the minors, in substance alleging that the \$500 legacies were specific in nature; that the money by the terms of the will was to be left in the Omaha National Bank, and the administrator had no right to it, and had no authority to make the compromise. She objected to the allowance of any compensation to the administrator, or to the payment of any costs or attorney's fees, and prayed for an order on the administrator to pay over the full amount of \$1,500, with 7 per cent. interest.

An amended report was then filed by the administrator, setting out the facts more specifically, and with this was filed the itemized bill of Fremont Benjamin for \$175 for services as attorney. Amplified objections were filed to the report as amended by John G. Kuhn, guardian *ad*

litem for the minors. The county court found that the \$500 bequests were specific, and that no part of the costs should be charged against them; that there was no necessity for the suit against the executrix and the Omaha National Bank; that it was not authorized by the court, and no allowance should be made for costs and expenses connected with it; that the administrator is entitled to a commission of \$74.55, the attorney a fee of \$35, and the guardian *ad litem* a fee of \$25; that the administrator should have in his hands \$1,649.90 in cash. It was ordered that the administrator pay \$500, with any interest said sum may have earned, to the guardian for each minor.

On appeal to the district court, that court made substantially the same findings as the county court; found in addition that the executrix was ready and willing to carry out the provisions of the will, that on January 10, 1908, the administrator did not deposit the money in the Omaha National Bank as required by the will, but diverted it; found that the claim for payment to Ralph E. Bush should be allowed in the sum of \$299.31, and the remainder disallowed. It was ordered that the administrator pay into county court for the use of each of the minors \$500, with 3 per cent. interest from January 10, 1908 (the date of withdrawal from the bank), to the date of the decree in the county court, and with 7 per cent. interest from that date; that the fees of the guardian *ad litem* be fixed and allowed by the county court as part of costs of administration, and that the costs of the appeal be paid by the administrator. From this judgment this appeal has been taken.

It was argued by counsel for the guardian *ad litem* that the legacies to the minors are specific legacies, and that of Ralph E. Bush a general one, and that, if so, the entire amount bequeathed to them must be paid over for the children without deduction for costs or expenses. It is clear that the legacies to the children are specific in their nature, but that to Ralph is equally so. The authorities are uniform that such bequests as "All the books in my

library," "All the horses in my stable," "All the furniture in my house," "All the money in a certain bank" are specific. Note to *Snyder's Estate*, 11 L. R. A. n. s. 49, 55 (217 Pa. St. 71); 2 Redfield, Law of Wills (2d ed.) pp. 134, 135; 2 Williams, Law of Executors (7th Am. ed.) p. 440, and note; *Perkins v. Mathes*, 49 N. H. 107; 7 Words and Phrases, p. 6600. Under the facts presented, we think all four of these legacies were specific with respect to the general estate of the deceased. They must be considered then with respect to each other as of the same rank, and, while the rule of exoneration will apply as against the general estate, no priority exists in favor of one over another.

The principal question presented is whether the court erred in refusing to allow the administrator for expenses incurred in the action to recover the certificate of deposit. It is the duty of a guardian to exercise due and proper care to protect and conserve the estate of his ward. In the mind of Nellie Bush, the mother of the children and their authorized guardian, there was what seems from her evidence to have been a well-grounded fear that if the fund was permitted to remain in such condition that the executrix in California, whom the will provided should be appointed without bond, could withdraw it, there was grave danger that it might be lost to the children. This being so, she did the natural and proper thing, consulted a reputable attorney and laid the facts before him for the purpose of taking steps to effectually secure the legacies. The advice which the attorney gave her under this statement of fact seems to have been sound. He proceeded to secure the appointment of an administrator with the will annexed, and afterwards took steps to prevent the payment of the fund by the Omaha National Bank to the executrix. On the same day, July 12, 1907, he wrote to the executrix, or her attorney, endeavoring to have her turn over the certificate of deposit without legal proceedings. In response to this letter, her attorney replied that she was desirous of having the estate settled as promptly and amicably as possible, but that he was of opinion that

the county court of Douglas county had no jurisdiction over the money in the bank, that the California court alone had jurisdiction, and that any payment she might make to the Nebraska administrator would be void. After the receipt of this letter, Mr. Benjamin began an action in the district court to impound the fund in the bank and for the delivery of the deposit, which suit was subsequently compromised as set forth in the administrator's report.

The administrator had not been previously authorized by the county court to bring this suit or to compromise the matter. For his own protection an administrator should always apply to the county court for leave to compromise and settle actions by him brought with respect to the recovery of assets of the estate, and should receive the sanction of the court before proceeding; otherwise, he takes the risk upon himself of being compelled personally to respond to the estate for the full claim and for the costs and expenses. If the circumstances at the time the suit was begun were not sufficient to justify a prudent and cautious man in undertaking its prosecution, or the compromise is one which men of average business ability would not have made, the administrator cannot be allowed credit for the costs, expenses or deduction. Schouler, Wills and Administration, secs. 298-387, and note. The same rule applies with reference to such matters as applies to all other business transactions of an administrator with reference to the estate. Good faith and diligence are required of him. If in the exercise of sound reason under the circumstances of the case it would seem to an ordinary, prudent and cautious man necessary for the best interests of his trust to act as he did, the compromise should be approved by allowing the claims caused thereby in his final report, even though subsequent events should show that the action was unnecessary. *Dundas v. Chrisman*, 25 Neb. 495; *McDowell v. First Nat. Bank*, 73 Neb. 307; *In re Estate of Bullion*, 87 Neb. 700; 2 Woerner, American Law of Administration (2d. ed.) secs. 323, 324; 2 Perry, Trusts and Trustees (6th ed.) sec. 916.

In re Estate of Bush.

It is not to be presumed that such officers are infallible, nor are they to be charged with greater wisdom than that of ordinary, prudent persons in the conduct of such matters. The interests of minors must be protected by ordinary mortals, and a rule which required more than ordinary wisdom or foresight on the part of trustees would by its harshness lead probably to worse evils than the present common-sense doctrine. It would seem that any prudent and cautious attorney acting in behalf of these minors, after their guardian and mother had told him (as Mrs. Bush testifies she told Mr. Benjamin) that she had no confidence in the executrix, that she was afraid she might squander the money in California, that in some matters she had not been strictly honest, that, if the money was administered in California, she did not expect to get any of it for the children, and for that reason she wanted to get the money here under her control, would have advised and taken legal steps of some nature to preserve this fund. We are of opinion that both Mrs. Bush, as guardian, and Mr. Benjamin, as attorney, were justified in proceeding in Nebraska as they did with respect to this fund, rather than in California. Whether the steps taken in all respects were in accordance with strict legal principles is not so material here as whether they were justified by the apparent necessity. If no proceedings had been brought, and Mrs. Bush's fears had proved to be well founded by the executrix drawing the money and squandering it, would she not have been subject to censure if she had taken no action in behalf of her wards? Whether an ancillary administrator has the legal right to impound such assets as these is not the question. It is rather, if he does so in good faith, shall he recover any reasonable sums paid out in so doing? We are all of the opinion that the compromise with the attorneys for the executrix by which the control of the fund was transferred to the local administrator was not unfair, unjust to the minor legatees, or improvidently made. The general rule in equity is that, where it is necessary to incur costs or expenses in order to

In re Estate of Bush.

protect a fund in which several are interested, the necessary expense shall be borne by the fund and prorated in proportion to the interests of the persons owning the fund. 2 Perry, Trusts and Trustees (6th ed.) sec. 910; *Marshall v. Piggott*, 78 Neb. 722. We are therefore of opinion that the entire costs and expenses of procuring the fund to be brought under the control of the administrator in this state should be prorated between the various owners in proportion to their interest therein, and the administrator should be credited as against the minor heirs only with that proportion of the total costs and expenses which \$1,500 bears to the entire fund, or, in other words, that the shares of these minors should bear no more than their proper proportion.

When the administrator received the fund, he placed it to the credit of the Benjamin Real Estate company. "It is a settled principle of law that, where an administrator mingles the funds of the estate with his own and uses them for his own benefit, he is chargeable with interest." *Westover v. Carman's Estate*, 49 Neb. 397; *In re Estate of Bullion*, *supra*. He is therefore liable for interest at the legal rate for all the money in his hands from the date of its withdrawal. The administrator should be credited with the costs and expenses of the administration proper in the county court, including a reasonable fee to Mr. Benjamin for his services in the matter of the claim of Crofoot & Scott, and the preparation of the necessary petitions, reports, etc., and also with the statutory allowance to the administrator. He should also be credited as against the minor legatees in the proportion that \$1,500 bears to the whole amount of money in the fund when received by him with the costs and expenses in the suit in district court, etc., as set out in the administrator's report, including a reasonable attorney's fee to Mr. Benjamin for services in that matter. It appears that the administrator is a son of the attorney, barely of age. The father appears practically to have administered the estate. The amount of the statutory compensation to the

Freadrich v. State.

administrator under the circumstances should be applied on the attorney's compensation. The guardian *ad litem* should be paid from the minors' shares.

It being impossible to finally adjust the account in this court, the decree of the district court is reversed and the cause remanded, with directions to adjust the account of the administrator as respects the minors in accordance with this opinion.

REVERSED.

LORENCE R. FREADRICH ET AL. V. STATE OF NEBRASKA.

FILED MAY 23, 1911. No. 16,989.

1. **Food: SALES: MARKING WEIGHT ON PACKAGES.** A corporation, whose principal business in manufacturing and selling a certain food product in package form is at wholesale, *held* not to be exempted from the requirement of the statute as to marking the weight or measure of the net contents of the package on the label by reason of the fact that it also maintains at its packing house a retail store at which it sells packages of the same nature at retail to consumers.
2. **Constitutional Law: "PURE FOOD LAW."** An act of the legislature which in effect places persons who manufacture and sell, or who sell either at wholesale or retail, certain specified food products in package form, not put up by retailers, in one class, and retailers who put up and sell the same products in package form themselves in another class, and provides that such foods sold in package form, not put up by the retailer, shall bear a printed label showing net weight or measure of the contents, does not deprive one who sells a "misbranded" package of the equal protection of the laws, and is not violative of the fourteenth amendment to the constitution of the United States.

ERROR to the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

T. J. Mahoney and J. A. C. Kennedy, for plaintiffs in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

LETTON, J.

Defendant was convicted of selling a misbranded pail of lard.

He contends that the law under which he was convicted (Comp. St. 1909, ch. 33; Ann. St. 1909, secs. 9818-9840), known as the "Pure Food Law," is in contravention of the fourteenth amendment to the constitution of the United States, in that it deprives him of his property and of liberty without due process of law, and denies him the equal protection of the laws. It is also contended that the package sold was put up by a retailer, and therefore that the sale was permitted by the statute. For convenience we will consider the latter point first. The stipulation of facts recites:

"4. That on said 22d day of September, 1909, said defendants sold to one Harriet S. MacMurphy in the county of Lancaster and state of Nebraska, for use in said state of Nebraska, one pail of lard in package form, said package not having been put up by said defendants, and said package being other than canned corn, and not having any statement printed or stated on the outside of said package of the net weight or measure of the contents thereof exclusive of the container. Said package contained an article of food, to-wit, lard."

"6. The principal business of said Armour & Company at and prior to said 22d day of September, 1909, was the slaughtering of cattle, hogs, and sheep, the dressing of the meat of said animals and the production, preparation, sale and marketing of the various food productions derived from the slaughtering of said animals, among which is lard, one of the products derived from the carcasses of hogs. Said Armour & Company at and prior to the 22d day of September, 1909, sold the largest part of the output of each of its packing houses in wholesale quantities and at wholesale trade, but at all of said times said Armour & Company maintained and operated, at its packing house in South Omaha, Douglas County, Nebraska,

a retail meat market at which it sold at retail, direct to consumers, lard and meat products.

"7. The package or pail of lard above mentioned which was sold by these defendants on the 22d of September, 1909, as above stated, was put up by said Armour & Company at its packing house in South Omaha, Nebraska, and was sold by said Armour & Company to these defendants with other like packages in wholesale quantities and as a part of the wholesale trade of said Armour & Company, and said package was sold by these defendants to said Harriet S. MacMurphy in the course of their regular retail trade and as a retail sale.

"8. Said package was sold by these defendants to said Harriet S. MacMurphy not as a package of any stated or given weight or measure but simply as a 'pail of lard.' "

Section 22, ch. 33, Comp. St. 1909 (Ann. St. 1909, sec. 9839), which is the provision under which this prosecution was brought, provides: "That no person shall within this state manufacture for sale therein, or have in his possession with intent to sell, offer or expose for sale, or sell any * * * article of food * * * which is adulterated or misbranded within the meaning of this act." Section 8 of the same act (Ann. St. 1909, sec. 9825) contains a very long, involved, verbose, and awkwardly expressed exposition of the term "misbranded" as used in the act. It seems to have for its foundation the act of congress upon the same subject, but has a number of variations therefrom. So far as applies to the question here, and omitting the portions thereof which do not refer to the present controversy, it is as follows: "That for the purposes of this act an article shall also be deemed to be misbranded * * * Third. If sold for use in Nebraska and in package form, other than canned corn; if every such package, as provided and named below, does not bear a correct statement clearly printed on the outside of the main label, of the contents and also of the net weight or measure of the contents exclusive of the container, viz., all dairy products, lard, cottolene, * * *

Provided, however, that the provision shall not apply to packages put up by the retailer, nor to packages on hand by any retailer at the time of taking effect of this act."

The argument is that, since Armour & Company operate a retail store in South Omaha and are "retailers" in respect to the traffic therein, though wholesalers and manufacturers with respect to the preparation, putting up and selling to defendant of the particular package sold by him, they must be held to be retailers for all purposes, under section 251 of the criminal code, because a penal statute may not be extended by implication beyond its express terms. It is also said: "This package was put up by Armour & Company. Armour & Company is shown by the stipulation of facts to be a retailer. Consequently, under the plain import of the words, and eliminating all straining after the supposed spirit, the act does not apply to the package in question in this case."

This argument seems to be based on the assumption that a corporation or person can act in but one capacity or engage in but one business; or else that it may, chameleon-like, change its complexion to suit the exigencies of the occasion, and adopt such a description of itself as may seem best to fit the emergency. Could it be contended that an ordinance regulating retail dealers in South Omaha could not operate on Armour & Company's retail store because, one branch of their business being wholesale, they thereby became wholesalers, or that an ordinance governing wholesalers or manufacturers could not apply to them because they are retailers? With the putting up or selling of the pail of lard, Armour & Company as retailers had nothing to do. It was Armour & Company, packers, who put up the lard in the package, and, as the stipulation recites, "it was sold * * * as a part of the wholesale trade of said Armour & Company." One might as well say that one having the right to sell goods as a merchant in a building in the ordinary course of business must also have the right to sell goods as a peddler without license or restriction, though a regulating ordi-

nance as to the latter calling was in force; or that a saloon-keeper who sells wine made from grapes grown by himself (as he may do without a license in this state) may sell all kinds of intoxicating liquors because of his right to sell such wine as a producer.

As to the contention that the act violates the fourteenth amendment: One of the principal objections made is that the law deprives defendant of the equal protection of the law because "it interposes impediments in the pursuits of one person which are not applied to the same pursuits of others under like circumstances; and it attempts to accomplish this under the mere guise of classification, when the classification is purely arbitrary and is not based on any difference which bears a just and proper relation to the attempted classification." It is asked why should a statement of the weight or measure be required upon a pail of lard, and not upon a can of oysters, or upon a can of syrup, and not upon a can of salmon, or upon a can of peaches or cherries, while peas or beans may be sold unbranded? In answer to this it may be said that it was within the power of the legislature to require all foods put up in packages to bear upon the package the net weight or measure of the contents. By the terms of the act this is required in the case of "all dairy products, lard, cottolene, or any other article used as a substitute for lard, wheat products, oat products and corn products and mixtures, prepared or unprepared; sugar, syrup and molasses, tea, coffee, canned, dried fruit." Comp. St. 1909, ch. 33, sec. 8. It is possible that experience taught the legislature that the opportunities for fraud or deception in the weight or measure of the articles embraced in this classification were greater than in the case of other products, or that the volume of trade and consumption of these articles of food was so much greater and more important than that of other articles that it was wise to include them only.

It is possible, nay even probable, that there are many other articles which should be embraced within the provi-

sions of the act, but, does the mere fact that the legislature has not included all that it might include vitiate the law as respects those within its terms? We think not. The fact that the legislature did not cover all articles of food is not a just ground of complaint. As well say that acts governing the sale of intoxicating liquors are invalid because all other intoxicating substances are not included. Legislation is to a large extent an evolutionary process, and legislatures often work by piecemeal. Not infrequently they approach a new subject of legislation in a timid and halting spirit, and it often takes years and many sessions to frame legislation covering a whole subject. A good example of this is to be found in the legislation in this state with respect to combinations in restraint of trade. *State v. Omaha Elevator Co.*, 75 Neb. 637. Mr. Justice Holmes says in *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 Sup. Ct. Rep. 66: "Again, if an evil is specially experienced in a particular branch of business, the constitution embodies no prohibition of laws confined to the evil, or *doctrinaire* requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606. And if this is true, then in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what legislatures have approved." *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. Rep. 114; *State v. Moore*, 104 N. Car. 714.

The argument as to the wisdom or lack of wisdom in failing to include certain other classes of foods is one which might properly have been presented to the legislature, but is not one which appeals to the court. The classification may be, to some extent, arbitrary in its nature, but it is difficult to draw the line, and there may have been, and no doubt were, reasons appealing to the legislative mind which are not presented here and are not

apparent to us, but which may, nevertheless, exist. The court does not sit to review the wisdom of legislative acts. Its only function in this respect is to determine whether it has acted in such a manner as to violate the constitutional provisions.

It is said, however, that the most vicious classification in the act is that which undertakes to discriminate between persons, and which makes identically the same act done by one person a crime which if done by another is perfectly innocent; that if a retailer may purchase lard in bulk and put it up in pails exactly like the one in question in this case, and sell it without any label as to weight or measure, he has committed no crime, while if this was done by a manufacturer or wholesaler the statute makes the act a crime. This may be true, indeed under the act must be true, but does this result of necessity deprive either the retailer or the wholesaler of the equal protection of the laws? The argument made is that classification is not in itself a complete protection against attack on a statute which attempts to discriminate between different classes of persons, and that in order to sustain such a law "it must appear that the interests of the public generally as distinguished from those of a class are involved, and the means must be reasonably necessary for the accomplishment of the purpose; that the act must have a direct relation as a means to an end, and the end itself must be appropriate and legitimate; that no impediment should be interposed to the pursuits of any one, except such as are applied to the same pursuits by others under like circumstances; and no greater burdens should be laid upon one than are laid upon others in the same calling and condition. It must appear that the classification is upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

Much stress is laid on the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, and the case of *Low v. Rces Printing Co.*, 41 Neb. 127, and

a number of other cases of undoubted force are cited as sustaining these principles. We have no quarrel with the principles. The difficulty is in their application. Time and necessary limitations to the length of this opinion prevent setting forth all the objections urged, but among them it is said this is "a classification not based on the kind of article sold, not based on any theory that there may be greater opportunities for cheats in goods sold in package form than in sales made in bulk, or on the theory that there is greater likelihood of cheating in the sale of one kind of article than in another, but it is based solely and simply on a mere matter of personality. It cannot be defended on the theory of the public interest, because the wholesaler and the retailer are alike free to refuse to trade when and with whom they will. It cannot be justified on the theory of corporate regulation, because the wholesaler may be, and often is, a natural person, and the retailer may be, and often is, a corporation. It puts a greater burden upon one man than on another under precisely the same conditions. It puts impediments in the way of one that are not interposed in the case of the other. It offends flagrantly against every principle of equal protection of the law."

These are grave and weighty criticisms, but we are more impressed by other considerations. In our view the act is, in respect to the matter involved, practically a police regulation governing the manufacturing for sale in this state and the selling of certain kinds of food in closed packages put up by wholesalers, manufacturers, or persons other than retailers. All persons engaged in the same business—the manufacture for sale in this state or the selling of certain food products in package form put up by other than retailers—are treated alike by the statute. The fact that packages put up by the retailer are not included in this regulation we think is not material. It is very probable that the legislature ascertained that by far the greater quantity of food products put up in closed packages are prepared and sold by wholesalers, and that the

comparatively insignificant quantity put up by the retailer, with the opportunities for inspection and correction afforded by the nearness of his customer, furnish a sufficient ground to classify and discriminate. Furthermore, it is a matter of common knowledge that foods are seldom put up in closed package form by retailers (though the stipulation recites that lard is put up and sold by retailers in like pails), while within the last few years there has been an immense development (much to be welcomed upon sanitary grounds) of the practice of putting up foods at the place of their preparation or manufacture in tightly closed or sealed receptacles, so that the consumer may receive the same with the liability of contamination by exposure to unclean handling or liability of infection entirely done away with. This practice has grown with the demand of the public for better sanitary conditions, and has been met by the enterprising and intelligent manufacturer by ingenious methods of inclosing various articles of food in different receptacles best suited for the purpose.

The principal object of the legislature was to protect the public from the danger of fraud caused by the absence of uniformity in the amount of goods placed within the respective packages. The legislation is of the same nature as that concerned with the prevention of fraud by the regulation of weights and measures. Mr. Freund (Freund, Police Power, secs. 273, 274) points out that statutes not infrequently prescribe that certain forms of package shall contain a fixed amount by weight and measure; that such provisions are found with regard to hay, fish, fruit, hoops, staves, etc., and that of a similar nature are statutes prescribing the manner in which bread shall be sold, the measures by which milk shall be sold, and other provisions of like character.

The protection of the public from fraud by requiring the net weight or measure of the contents of closed packages to be marked upon the outside thereof is clearly within the police powers of the state. Where the neces-

sities of life are sold to a large extent in package form, it is almost as necessary that the public should be protected against imposition by scrimping the contents of a package, as it is that it be protected against adulterated goods, or deception in quality by means of coloring, or against false weights or measures. The fraction of an ounce taken from the contents of a single package may wrong a single consumer but little, but where hundreds of thousands of packages are sent out, as is done by large concerns, the additional profit to the manufacturer or wholesaler will be correspondingly great and the temptation to lower the contents may be too much to be withstood. This is a fraud or deception against which the consumer is almost incapable of defending himself, but one which the legislature, acting for all the people, may foresee and guard against.

We think there is a reasonable difference of condition between the wholesaler or manufacturer selling such packages of food and the retailer who puts up the packages himself and sells them to his immediate customers, and that this difference furnishes a reasonable basis for classification. If in such cases short weight or short measure is used, or packages, which by artful means deceive the eye as to their contents, are put up, the ultimate consumer is usually far removed from the guilty manufacturer or wholesaler, and is practically without a remedy under the prevailing methods of the trade in this country at the present time; while, if the same act were perpetrated by the retailer from whom he purchases, the offender is within his reach and several methods of relief from further exaction are open to him.

A case nearly in point is *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. Rep. 554, in which case a statute of the state of New York by which producing and unproducing venders of milk were classified differently with respect to the sale of milk was considered. It was argued in that case, as in this, that the act of selling by members of one class was permitted, while the act of sell-

ing by members of the other class was prohibited or penalized. Mr. Justice McKenna, writing the opinion, says: "If we could look no further than the mere act of selling, the injustice of the law might be demonstrated, but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vender he is exempt from the penalty; as it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt. In the one case the source of the milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances." See, also, *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. Rep. 43; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 21 Sup. Ct. Rep. 201; *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. Rep. 114.

It was held in *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. Rep. 671, that liquor sellers were not denied the equal protection of the laws because producers or manufacturers of wines were exempted, while the wines were in their hands, from the tax imposed upon other liquor dealers, though both might be selling the same kind of wine. The main argument in that case, as in this, was based upon the

decision in *Connolly v. Union Sewer Pipe Co.*, *supra*, and on the notion that the statute discriminated between two classes of persons.

A Georgia statute imposed a tax upon certain persons hiring men to labor outside the state, but not upon persons engaged in hiring persons to work within the state. This was held in *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. Rep. 128, not to violate the fourteenth amendment. See, also, *Cook v. Marshall County*, 196 U. S. 261, 25 Sup. Ct. Rep. 233; *Halter v. Nebraska*, 205 U. S. 34, 27 Sup. Ct. Rep. 419; *State v. Moore*, 104 N. Car. 714.

The argument in *St. John v. New York*, *supra*, is that the classification is made for the purpose of aiding in the efficient administration and enforcement of the law, and that there is a proper and justifiable distinction between the two classes of dealers, considering the purposes of the law and the means to be observed to effect that purpose. And so in this case the purchaser deals with and relies upon the retailer. If the retailer puts up packages himself, and there is fraud in the quantity or weight, he knows that he is committing a fraud and is wholly responsible for it. If, on the other hand, the retailer buys packages from the wholesaler which he supposes to be genuine and honest, and sells as he buys, he has no means of knowing whether he is committing a fraud or not, and therefore packages that as such are to pass from hand to hand should be branded, so that all parties dealing with them may know that they are not guilty of fraud in so doing.

In conclusion, we adopt the views of Mr. Justice Holmes expressed in *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. Rep. 186: "In answering that question (whether the statute violates the fourteenth amendment) we must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great

guaranties in the bill of rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power. * * * It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The statute under consideration places all persons who sell packages of the specified products put up by other than retailers under the same restrictions, subject to like penalties and punishments, so that every person engaged in the same business is equal both with respect to burden and with respect to the protection of the law. This being the case, it does not violate any of the provisions of the fourteenth amendment. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110.

The case was submitted to the district court upon a stipulation of facts. Where grave questions of constitutional law are concerned involving the construction of the constitution of the state or of the fourteenth amendment to the constitution of the United States, we are reluctant to act in a case where the facts which are presented to us are only such as are agreed upon by counsel. It has been our experience that the real facts upon which the determination of a case depends are often better arrived at by the process of examination and cross-examination of witnesses than by stipulation. The court prefers that, where

Lichtensteiger v. State.

questions of fact are involved in cases of the importance of this, they should be determined upon the testimony of witnesses, rather than by agreed statements.

The judgment of the district court is

AFFIRMED.

FAWCETT and ROSE, JJ., not sitting.

JACOB LICHTENSTEIGER V. STATE OF NEBRASKA.

FILED MAY 23, 1911. No. 16,990.

Food: PURE FOOD LAW: COTTOLENE. A proviso in a statute is generally intended to except something from its operation which would otherwise be within its provisions. Under the pure food law of 1909, a package of cottolene, if sold for use in Nebraska, must bear a statement on the label of the net weight or measure of the contents exclusive of the container, unless it contains the other brands and marks upon the label provided for in the first or second subdivisions of the proviso to section 8, ch. 33, Comp. St. 1909 (Ann. St. 1909, sec. 9825).

ERROR to the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

T. J. Mahoney and J. A. C. Kennedy, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

LETTON, J.

Plaintiff in error was convicted of selling a misbranded can of cottolene. The case was tried by consent upon an agreed statement of facts. From this statement it appears that the pail or can of cottolene had no statement printed or written on the label of the net weight or measure of the contents exclusive of the container; that the

cottolene was manufactured by the N. K. Fairbank Company at Chicago, was sold with other like packages in wholesale quantities to a wholesale grocer in Lincoln, by this grocer in like quantities to defendant, and by the defendant to another person as a retail sale. That the word "cottolene" is a name adopted by the manufacturers as the distinctive name of a compound, and that cottolene is a proprietary article manufactured by said N. K. Fairbank Company which is not an imitation of or offered for sale under the distinctive name of any other article; that cottolene is a mixture or compound composed of cottonseed oil and beef fat and no other substance, and does not contain any added poisonous or deleterious ingredients; that on the outside of the package, among other matters, is set forth the name, the place of manufacture, the words, "Cottolene, Cottonseed Oil—Oleo Stearine," and on the side of the pail, among other printed matter, the following: "Cottolene contains nothing but pure vegetable oil and choice pressed beef fat, prepared by our exclusive methods;" that for many years past cottolene has not been sold by weight or measure, or in packages intended to pass as or for any fixed or given weight or measure, and that the package sold by the defendant was not sold as containing any fixed weight or measure, but was sold simply as a pail of cottolene.

1. The same contention is made in this case with respect to the statute being in violation of the fourteenth amendment of the constitution of the United States as is made in *Freadrich v. State*, ante, p. 343, and on this point the case is ruled by the opinion therein.

2. Plaintiff in error insists that under a proper interpretation of the statute the package of cottolene sold was not "misbranded," for the reason that while the third subdivision of the first paragraph of chapter 67, laws 1909 (Comp. St. 1909, ch. 33, sec. 8; Ann. St. 1909, sec. 9825), provides that articles of food shall be misbranded: "Third. If sold for use in Nebraska and in package form, other than canned corn; if every such package, as provided

and named below, does not bear a correct statement clearly printed on the outside of the main label, of the contents and also of the net weight or measure of the contents exclusive of the container, viz., all dairy products, lard, cottolene, or any other article used as a substitute for lard, wheat products, oat products and corn products and mixtures, prepared or unprepared; sugar, syrup and molasses, tea, coffee, canned, dried fruit," still that by a later general proviso in the same section it is "provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of, or offered for sale, under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced, and the ingredients composing said food. Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale, and the ingredients composing said articles."

It will be seen that the statute first includes "cottolene" among the class of articles which are to be deemed "misbranded" unless the weight or measure of the net contents is printed on the label, but afterwards provides that an article of food which does not contain any added poisonous or deleterious ingredients, if a mixture or compound sold under its own distinctive name, and not an imitation of, or offered for sale under the distinctive name of, another article, if the place of manufacture and the ingredients composing the food accompany the name on the label, and compounds, if labeled so as to plainly indicate that they are compounds, and the ingredients composing the articles

are also plainly indicated on the label, "shall not be deemed to be misbranded." By the agreed statement of facts it is shown that the label fully complied with the requirements of the proviso as to the class described in the first subdivision. It is difficult to say what the legislature intended by requiring in one portion of the section that packages of cottolene should be deemed misbranded if sold without a statement of the weight or measure on the outside of the container, and by later providing that the class of food products within which cottolene plainly belongs should not be deemed misbranded if put up in packages with the identical information printed on the label which the pail of cottolene sold bore on its label. Reference to other products named in the same section rather increases the uncertainty than clarifies the meaning. The same provision is made with reference to wheat products, oat products, and corn products and mixtures. It is a well-known fact, of which we think we are justified in taking judicial notice, that many wheat products, oat products, and corn products and mixtures are upon the market in package form under distinctive names, and complying with the first subdivision of the proviso. If the proviso is held not to apply to the third subdivision of section 8, all such articles, compounds or mixtures, though sold as preparations under their own distinctive names and apparently intended to be exempted, must be branded with the net weight or measure of the contents of the package.

What is the effect of the proviso? "A proviso is something engrafted upon a preceding enactment, and is legitimately used, for the purpose of taking special cases out of the general enactments, and providing specially for them." Dwarris (Potter), *Statutes and Constitutions*, p. 118. "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause." *Wayman v. Southard*, 10 Wheat. (U. S.) 1. *Voorhees v. Jackson*, 10 Pet. (U. S.) *449; 2 Sutherland (Lewis), *Statutory Construction* (2d

ed.) sec. 351. Under these principles we must hold that the proviso controls the preceding provision. Section 251 of the criminal code provides, among other things: "No person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." This being the law, we cannot say under the contradictory provisions of the pure food statute that the selling of such a package of cottolene as described in the evidence is made penal by the plain import of the words of the statute. Under the law of 1909, a package of cottolene, if sold for use in Nebraska, must bear a statement on the label of the net weight or measure of the contents exclusive of the container, unless it contains the other brands and marks upon the label provided for in the first or second subdivisions of the proviso. The stipulation of facts shows that the label complies with all the requirements of the first subdivision of the proviso, and, this being so, the statute declares: "It shall not be deemed to be adulterated or misbranded." This is the meaning the legislative department of the government has given to this statute. The legislature of 1911 perceived the confused, contradictory, and ineffective character of these provisions, and amended this section so as to require the net weight to be placed on packages of compounds and mixtures, as well as on packages of unmixed products.

Taking the 1909 statute as we find it, we are convinced the evidence does not support the conviction. The judgment of the district court is

REVERSED.

FAWCETT and ROSE, JJ., not sitting.

OLENA SWANSON, ADMINISTRATRIX, APPELLER, V. UNION
STOCK YARDS COMPANY, APPELLANT.

FILED MAY 23, 1911. No. 16,338.

1. **Master and Servant: INJURY TO SERVANT: NEGLIGENCE.** A track-man working in obedience to the orders of his foreman upon a railway track in a stock yards, and in such a position that he could not see cars shunted down the track against empty cars standing thereon in close proximity to him, ordinarily has a right to rely upon his foreman's uniform custom to watch and warn him of approaching cars.
2. ———: ———: **LIABILITY: CONTRIBUTORY NEGLIGENCE.** And if, under those circumstances, the foreman departs from his men under circumstances justifying a belief that he intends to occupy a more advantageous point from whence to watch for cars, and without informing them they must rely solely upon their own senses for protection, and he knows that a switching crew and engine are engaged in kicking cars down the track upon which his men are working, but out of their line of vision and that of the switchmen, and does not inform them of the situation, and as a proximate result thereof one of his men is injured by a moving car, the employer is liable if the injured employee is not guilty of contributory negligence.
3. **Appeal: ERROR NOT AFFECTING SUBSTANTIAL RIGHTS.** In reviewing the record of an action in the district court, this court will disregard any error or defect in the proceedings which does not affect the substantial rights of the complaining litigant, and will refuse to reverse a judgment because of any such error.
4. **Death: EXCESSIVE DAMAGES.** In an action to recover for the widow's sole benefit for the death of her husband, a recovery of \$5,000 is excessive in view of the fact that he was 65 years of age at the time of his death, earned but \$12.50 a week, and had no source of income other than the result of common labor.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed on condition.*

Greene, Breckenridge & Matters, for appellant.

H. C. Murphy and J. C. Kinsler, contra.

Root, J.

This is an action to recover damages for the death of August Swanson, which was caused, as alleged, by the defendant's negligence. The plaintiff prevailed, and the defendant appeals.

The defendant in the prosecution of its business employs several switching crews and a number of trackmen. at the point where Swanson was killed three lines of railway lie parallel to each other and to about 40 connected pens used to restrain live stock which are unloaded from cars upon the track nearest the pens. This track is described as the "chute track," the other tracks are known as the "middle" and "outside" tracks, respectively. Early in the forenoon of the day in question, Swanson and several other laborers were working upon the chute track, but were disturbed by the approach of a train of cars loaded with live stock. In obedience to the orders of John Sund, their foreman, a number of the men went to a distant part of the yards, while Swanson and several other of the men commenced to clean the middle track at a point opposite to where they had been working on the chute track. To comply with the orders, it was necessary for the men to go upon the middle track and with their shovels remove therefrom accumulated sand, cinders, offal and rubbish. At the time this change was made, several empty stock cars or box cars, variously estimated at from three to eight in number, were standing upon the middle track, where they had been shunted by a switching crew which was engaged in "sorting empties" further down the track to the south. Swanson and the other men worked northward from the empties. Sund testifies that he hired and discharged men in his gang, that he directed their movements, watched for approaching cars or engines, and warned his men, and this had been his uniform custom. Swanson had worked for the defendant in the capacity of a sectionman for more than five years before his death, and Sund had been his foreman during that period. Within a

few minutes of the time the men commenced to clean the middle track, the empty cars were moved slowly forward for the space of about 50 feet, evidently propelled by the impact of other empty cars which had been kicked down the track, and the men moved a corresponding distance northward, but continued their work. The men were working at intervals for a distance of four rail lengths from the empties, and Sund was at the extreme northern limit of this space. Because of the stock train, the curve in the tracks, and the empty cars south of the men, it was impossible for them to see cars or a locomotive moving upon the track south of the empties. Sund left his men at work and walked southward past the empty cars to the switch engine, which at the time was not moving, and spoke to the engineer, but did not tell him or any of the switching crew that the sectionmen were at work on the middle track north of the empty cars, neither did he direct any person to keep a look out and warn the men while he was away from them. Within ten minutes after Sund's departure, about 13 empty cars were at one time shunted down the middle track at the rate of from four to ten miles per hour. The force of the impact of these cars with the other empty cars was so great that the latter moved forward so quickly that Swanson, who was in the act of thrusting his shovel into the soil while he was in a stooping posture, was knocked down, caught upon the rails, and three cars and the front wheels of a fourth car ran over him causing instant death.

The defense is a denial of the defendant's alleged negligence, and a plea of contributory negligence and of an assumption of risk. There are also some allegations in the answer evidently inserted to raise an issue that the defendant is not a railroad company. The trial judge, over the defendant's objections, submitted to the jury five distinct alleged negligent acts of the defendant, upon the proof of any one of which a verdict might be returned in the plaintiff's favor. The defendant by requested instructions sought to have all of these contentions withdrawn

from the jury, and now most strenuously argues that there is no competent evidence to sustain them. For the sake of argument, it may be conceded that the evidence will not sustain every charge of negligence thus submitted to the jury, but there is no conflict in the evidence concerning the foreman's relation to Swanson, or that it was his uniform custom to watch for approaching cars or engines while his men were working upon the track under circumstances at all like those surrounding them at the time Swanson was killed and to warn them of the facts. While the deduction of negligence or the want of negligence from primary facts admitted or proved in a particular case is one for the trier of fact to draw, yet it is inconceivable that any intelligent, fair-minded jury would fail to find the defendant negligent in respect to the conduct of John Sund in leaving his men at work behind, but in close proximity to, the barrier of empty cars without substituting another man to discharge his duty to watch and to warn, or, in default of so doing, in failing to notify them that for the time being they must depend solely upon their own senses for protection, or in failing to notify the switching crew of the position of his men. *Mullin v. Central R. Co.*, 77 N. J. Law, 241. We are of opinion that, if the court committed any error in submitting grounds for recovery that are not sustained by the proof, in the peculiar condition of the evidence that error is without prejudice and does not justify a reversal of the case. Code, sec. 145. We are further of the opinion that it is immaterial whether or not the plaintiff is a railroad company within the meaning of the employer's liability act (Comp. St. 1909, ch. 21, sec. 3 *et seq.*).

The court took the view that the defendant is a railroad company, and instructed the jury that Swanson's contributory negligence, if he were negligent, should only be considered in diminution of the recovery, if his negligence was slight and the defendant's negligence was by comparison gross. A learned argument was presented upon this subject, but we are of opinion that the law thus argued is not necessarily involved in this case.

The evidence to sustain the plea of contributory negligence, as we understand the record, is about as follows: Witnesses stated that sectionmen are required to protect themselves while working on the track and to keep a lookout for trains; that Sund, when about to depart from his gang, said "Be on the lookout, men!" that Swanson did not face the empty cars and worked too close thereto, notwithstanding a warning given by a Mr. Anderson that if he (Swanson) was not careful the cars "would drop down on him." Sund did not tell his men that he would not watch for or warn them, and he was going in the proper direction to secure a view of cars coming down the track from the south. It seems improbable that Swanson heard his foreman's statement uttered 120 feet distant from where Swanson was at work; but, if it is conceded that he did, the men were not told that they would be thrown upon their own resources for protection. In cleaning the track the men were in constant motion shoveling and walking to and fro. Swanson had a right to rely upon Sund. The foreman took no exception to the positions assumed by his men, and we think there is little, if any, evidence to sustain a deduction of contributory negligence. The issue, however, was submitted to the jury. Under the instructions, if the jury found Swanson guilty of contributory negligence, it was their duty to make a corresponding deduction in the recovery, provided they found that the defendant's negligence was gross in comparison. The verdict is for \$5,000, a sum that precludes a belief that the jury found the deceased guilty of contributory negligence. If the jury rejected this defense, as they had a right to do, it is immaterial whether or not the doctrine of comparative negligence was properly submitted to them. We think section 145 of the code controls this phase of the case. In our judgment to this point prejudicial error has not been established by defendant.

It is argued that the recovery is excessive, and a comparison of all of the evidence on this subject convinces us the defendant has just cause for complaint. Swanson at

the time of his death was 65 years of age, was survived by his widow, but, as we understand the evidence, by no children. For eight years preceding his death he had worked as a sectionhand and received \$12.50 a week, plus some indefinite amount for overtime. There were no children to receive a father's care. There is no proof that he was the master of a trade, or that he could earn money by any means other than by hard manual labor. Swanson's expectancy of life at the time of his death was between 12 and 13 years. We are not unmindful of the fact that but for this accident he might have lived to be 80 or 90 years of age, but it is not within the bounds of probability that until past 75 years of age he would retain the ability to perform the hard physical labor which seemed his only source of income. Had Swanson remained in the defendant's employ for 12 years at the wage paid him at the time of his death, losing no time because of sickness or of bad weather, he would have received \$7,800. One-half of that sum would in all probability be required for his own support. The widow is not entitled to receive more than the present financial value to her of her husband's life. If Swanson had not died, but should continue to earn without diminution in amount or for lost time the wages paid him at the time of his death, and had contributed one-half of his earnings to his wife for 13 years, or until he attained 78 years of age, the present value of that contribution on the basis of 5 per cent. interest would be \$3,056. Cases will arise where the courts should not hold a jury to a hard and fast rule of the present value of probable financial contributions in the future, but there is little, if anything, in the evidence in this case to justify a relaxation of the rule that there must be evidence from which the financial loss may with reasonable accuracy be computed. *Nilson v. Chicago, B. & Q. R. Co.*, 84 Neb. 595.

Under all of the circumstances of this case, we are of opinion that any recovery in excess of \$3,500 is excessive, and that, unless \$1,500 is remitted as of the date of the judgment, it will be reversed and the cause remanded. If,

Justice v. Button.

however, that remittitur is filed within 60 days of the filing of this opinion, the judgment of the district court will be affirmed.

JUDGMENT ACCORDINGLY.

WILLIAM F. JUSTICE, APPELLEE, V. ALBERT L. BUTTON ET
AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,448.

1. **Vendor and Purchaser: CONTRACT: TITLE.** Ordinarily there is an implied agreement on the part of the vendor in every contract for the sale of land that he will transfer a good title to the vendee, unless the contract relieves the vendor of that obligation.
2. ———: ———: ———. A good title is one that can be sold to a reasonably prudent man who might desire the property, or a title that can be mortgaged to a person of reasonable prudence as security for the loan of money.
3. ———: ———: **DEFECTIVE TITLE.** Unreleased and unsatisfied trust deeds executed to secure the payment of a debt constitute such a defect in the title that a vendee will be excused from accepting it, although upon the face of the record the statute of limitations may have barred the creditor or the trustee from foreclosing the deed or from selling the land thereunder.
4. ———: **DEFECTIVE TITLE: RECOVERY OF PRICE.** A purchaser of land, so long as the contract remains executory, may as a general rule recover back the purchase money he has paid thereon, if the vendor's title be not such as the purchaser is under the contract entitled to demand.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Flansburg & Williams, for appellants.

John M. Stewart, R. M. Proudfit and D. H. McClenahan, contra.

Root, J.

In January, 1908, the defendant Button Land Company, by a written contract with the plaintiff, agreed to sell him a tract of land in Colorado and received \$300 upon the purchase price. At that time the defendant did not own the land, but this fact was known to the plaintiff. Shortly thereafter the defendant orally agreed to furnish the plaintiff an abstract of title. Both parties treat this agreement as supported by the consideration which sustains the written contract, and we shall so consider it. The deal was to be closed on or before March 5, 1908, but the defendant could not perform on that day. On the 12th of March the plaintiff wrote and sent to the defendant a letter to the effect that, since it was some time past the date when the abstract was to be furnished and no word had been received with regard thereto, if the check for \$300 were returned the plaintiff would call the deal off. Subsequently the defendant furnished the plaintiff an abstract of title, and offered him a deed for the land, but signed by a third person. The plaintiff objected that the title was not good, and that the time had long since expired within which the contract should have been performed. Subsequently the plaintiff brought this action to recover the \$300. The defendant tendered the abstract and the deed in court, and asked that the plaintiff be required to specifically perform his contract. The case was tried as an action in equity, and both litigants were dismissed from court. The plaintiff appeals, and the defendant has filed a cross-appeal.

It is conceded that two trust deeds conveying this property to a trustee to secure the payment of an indebtedness were executed in 1889, and that they have not been released. The defendant, however, argues that, since a tax deed was subsequently issued for this land, and the affidavits attached to the abstract prove that the parties under whom he claims title have held possession by virtue of that deed for more than seven years preceding the

tender, and because the creditors are not within the exceptions in the Colorado statute of limitations, the deeds are not an incumbrance upon the land. The Colorado statute is neither pleaded nor proved; but, assuming that it is as contended for by the defendant, neither creditor makes a statement that the debt has been paid, and they would not be bound by an affidavit sworn to by the owner of the land. *Peckham v. Stewart*, 97 Cal. 147. The defendant did not in terms agree to furnish a marketable title, but that agreement is ordinarily implied in every real estate contract that does not fairly negative that obligation. That is, to furnish a title upon the security of which the vendee could procure a loan from a reasonably prudent man, or that would be taken by a reasonably prudent purchaser, should the vendee desire to sell. *Moore v. Williams*, 115 N. Y. 586; *Meyer v. Madreperla*, 68 N. J. Law, 258; *Durham v. Hadley*, 47 Kan. 73; *Fagan v. Hook*, 134 Ia. 381. The statute of limitations does not operate so successfully to cut off mortgage liens as it does to extinguish a legal title. In Nebraska, ten years continuous, hostile, adverse possession, under a claim of right, will create in the occupant a title which the courts will quiet against the holder of the legal title of record unless he is within some statutory exception; but as against the mortgagee the courts have been exceedingly tender, and ordinarily require payment of the debt as a condition to relief, without regard to the time the debt has remained unpaid. *Henry v. Henry*, 73 Neb. 752; 3 Pomeroy, Equity Jurisprudence (3d ed.) secs. 1219, 1221; *Farmers Loan & Trust Co. v. Denver, L. & G. R. Co.*, 60 C. C. A. 588.

The plaintiff was justified in refusing to accept the deed, and the defendant is not in position to demand a performance of the contract. The plaintiff was therefore entitled to recover the purchase money. *Maxwell v. Gregory*, 53 Neb. 5. The provision in the contract for a forfeiture of the payments if the contract is not completed cannot be invoked by a vendor who is unable to perform for want of sufficient title. *Platte Land Co. v. Hubbard*, 12

Hagedorn v. Maly.

Colo. App. 465; *Lewis v. White*, 16 Ohio St. 444. We do not think the record discloses that the plaintiff has, in any important particular, changed his position since this suit was commenced, but that while he may have placed more emphasis upon the defendant's failure to perform upon the law day than any other fact, he also objected to the title because of the trust deeds. The court therefore erred in dismissing the plaintiff's petition, but it was right in denying the defendant any relief.

The judgment of the district court therefore is reversed and the cause is remanded for further proceedings.

REVERSED.

CASPER HAGEDORN, APPELLEE, V. FRANK MALY ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,451.

Waters: DIVERSION: INJUNCTION. A landowner may enjoin the obstruction of an old, established drainage channel and the digging and maintenance of a ditch whereby surface water collected from a considerable area will be diverted from the natural course of drainage and poured onto his lands to his damage.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Affirmed.*

T. M. Franse, for appellants.

F. D. Hunker and *A. R. Oleson*, contra.

Root, J.

This is an action in equity to restrain the defendants from cutting a dike and from maintaining a ditch so that water will flow over and upon the plaintiff's land. The plaintiff prevailed, and the defendants appeal.

The plaintiff's land is east and south of the defendants'

farms. The Elkhorn river, into which the water from the territory to the west flows through sloughs, swales and other waterways, is still further eastward. In a state of nature the surface water, which originated upon a considerable area west of the defendants' land, flowed northeastward into a swale, and thence southeastward through that depression into the Elkhorn river. To shorten the course and to confine the water within more narrow bounds, the defendants about 24 years ago constructed a ditch east and west on the line between the north half and the south half of the northwest quarter of section 16, town 21, range 6, to the line running north and south through the center of the section, and from thence constructed the ditch northward so as to intersect the swale. This ditch is now from five to seven feet in depth, from four to six feet wide at the bottom, and from ten to twelve feet wide at the top. Parallel dikes are constructed on both sides of and close to the ditch, so that at the angle where the ditch turns northward the dikes are about five feet high. The swale referred to has become clogged with dirt and debris, which was deposited by the water from the ditch, and in consequence water does not flow therein so freely as it did in bygone years. The northwest corner of the plaintiff's farm is coincident with the exterior of the angle of the dike. The defendants dug a shallow, narrow ditch from the angle eastward upon the defendant Maly's land, parallel and close to the northern boundary of the plaintiff's farm, and deposited the excavated dirt along the northern side of this ditch, cut the embankment at the angle, and obstructed the older ditch at the point where it turned northward, and thereby made a way for the waters flowing eastward in the old ditch, so that the greater part flowed into the smaller drain, from whence a considerable part of it flowed to the south and upon the plaintiff's land to its injury and his damage. While a small fraction of this water would in the natural course of drainage flow eastward and southward, by far the greater part of it is diverted out of its natural course one-half mile west of the plaintiff's

Hazlett v. Estate of Moore.

land, is gathered up and confined in the ditch, and by those acts of the defendants is poured upon the plaintiff's premises out of the course of natural drainage and to his damage. This the defendants have no right to do. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Jacobson v. Van Boening*, 48 Neb. 80; *Nelson v. Wirthle*, 88 Neb. 595.

The judgment of the district court is right, and it is

AFFIRMED.

**ALFRED HAZLETT ET AL., APPELLANTS, V. ESTATE OF
THOMAS MOORE ET AL., APPELLEES.**

FILED MAY 23, 1911. No. 16,464.

Executors and Administrators: ALLOWANCE TO ATTORNEYS. Attorneys who, under employment by executors of a will, render necessary services beneficial to the testator's estate in the settlement thereof may, in a proper case, file with the county court an itemized bill for their compensation, and the county court has authority to allow a reasonable amount for that purpose as a claim against the estate, where those in control of it refuse to pay the claim and object to any allowance therefor.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. Reversed.

Hazlett & Jack, pro se.

E. O. Kretsinger and Rinaker & Kidd, contra.

ROSE, J.

As attorneys at law plaintiffs are seeking to recover the reasonable value of professional services rendered by them on behalf of the estate of Thomas Moore, deceased. An itemized bill for their fees was presented to and allowed by the county court as a claim against decedent's estate. From the order of the county court an appeal was taken

to the district court, where a demurrer to plaintiffs' petition was sustained and the claim disallowed. Plaintiffs have appealed to this court.

The record presents the sufficiency of the petition to state a cause of action. The authority of plaintiffs to practice law is properly shown by the petition. It is also alleged therein that they performed on behalf of the estate of the decedent the professional services disclosed by an itemized statement attached to the petition. It is further stated that the services were rendered upon the request of two of the executors of decedent's will, and, as shown by the itemized statement mentioned, were of the reasonable value of \$145, no part of which has been paid, except the sum of \$30, and that the amount due from the estate is \$110. In the fourth and fifth paragraphs of the petition it is alleged:

"That the said services were rendered at the request and direction of George Nicholas and George Buss, two of the executors of said estate; that at the direction and request and with the approval of said two executors of the estate of said Thomas Moore, deceased, plaintiffs filed their statement of account and claim against said estate for said services with the county court of Gage county, Nebraska, on the 15th day of September, 1906; that, at the time of rendering said services before mentioned, one Thomas W. Moore was the third executor of said estate; that, because a portion of said legal services were particularly useful to said estate, in preventing the said Thomas W. Moore from despoiling said estate, he refused to take part in the payment of plaintiffs' claim for legal services above set forth; and that the said Thomas W. Moore as one of the said executors had obtained possession of all the money and personal property of said estate and excluded the other two executors therefrom; and that the two executors who employed plaintiffs had not at any time any money or property of said estate in their hands with which to pay the claim of plaintiffs; and that the said two executors

Hazlett v. Estate of Moore.

did not at the time of or after the rendition of said services have in their hands any money or property of said estate, but that the money and personal property of said estate was taken and kept solely and alone by the said Thomas W. Moore, one of the executors of said estate, who for the reasons aforesaid, and for no other, refused to make payment to plaintiffs.

"That after said claim had been filed in the county court of Gage county, Nebraska, objections were filed to the same by James T. Moore, who had been appointed administrator *de bonis non* of said estate, in place of said George Nicholas, George Buss, and Thomas W. Moore, executors, though at the time of the filing of the claim by plaintiffs none of the said executors had yet filed his final report, nor been finally discharged, nor had a settlement at that time with said estate; that objections also to said claim of plaintiffs were filed in said county court by Thomas W. Moore, who is the only person appearing in this court in opposition to the claim of plaintiffs; that thereafter on the 30th day of July, 1907, the plaintiffs and the administrator *de bonis non* of said estate, and the said Thomas W. Moore and all parties in interest in said estate appeared personally and consented that a hearing be had at that time upon plaintiffs' said claim by said county court of Gage county, Nebraska, and that said county court after a full hearing allowed plaintiffs' said claim in the sum of \$115; that said order was appealed from by Thomas W. Moore, personally, and by no one else."

The defendant named in the petition is "The Estate of Thomas Moore, deceased." The demurrer, omitting the title and the signature, follows: "Now comes Thomas W. Moore, as defendant herein, an objector in the court below, and an heir and devisee under the will of Thomas Moore, deceased, and demurs to the petition of the plaintiffs, for the following reasons, to wit: 1. Said petition does not state facts sufficient to constitute a cause of action against the defendant or this demurrant. 2. That two executors could not bind said defendant and make it liable for any

amount of attorney's fee to the plaintiffs, as alleged in the petition; that they could only bind themselves. 3. The court has no jurisdiction of the person or the subject matter of the action."

Was the demurrer properly sustained? To maintain the affirmative of this question, demurrant observes that the petition shows on its face there was no contractual relation between plaintiffs and decedent, and that the contract relating to the performance of professional services and to the payment of fees was made with two executors of decedent's will. In this connection demurrant relies on the following doctrine announced by the supreme court of Iowa: "The services were rendered the administrator, and not the deceased, and the sole question in the case is whether the claim is one against the estate or against the administrator personally. If the latter, then the suit should have been brought against him personally. If the former, then the court was in error in sustaining the demurrer. There is a manifest distinction between debts of the decedent and liabilities contracted by his personal representative. The former are strictly claims against the estate, while the latter, although in the interest of and on behalf of the estate, is a personal liability of the representative. * * * It follows, then, that the estate is not liable to an attorney for his services at the instance of an administrator, but that the latter is himself liable in a suit by the attorney. There is little or no variation in the authorities on these propositions." *Clark v. Sayre*, 122 Ia. 591.

This doctrine is well supported by precedent, but there is both reason and authority for a different rule. The petition states these facts: Plaintiffs, under their employment, acted on behalf of the estate. They were employed by legal representatives of decedent. They prevented the despoiling of the estate, and their services were beneficial thereto. The representatives who controlled the estate refused to pay plaintiffs their fees, and objected to the allowance of their claim. The law is that the estate of

decedent is chargeable with the expenses of its administration. Comp. St. 1909, ch. 23, sec. 201. Sometimes an allowance for the services of attorneys may be included in such expenses. In his final account an executor should ordinarily be credited with reasonable attorney fees paid by him in proceedings to probate the will. *In re Estate of Hentges*, 86 Neb. 75. "A guardian has authority to bind the estate of the ward by a contract for services reasonably necessary to the preservation or management of such estate." *McCoy v. Lane*, 66 Neb. 847. The estate itself is ultimately liable for compensation for such services, and the rule is applicable to executors. It is the policy of the law to protect attorneys in their right to reasonable compensation. To that end an attorney's lien is authorized by statute. This lien attaches to money coming into an attorney's hands for the estate of a deceased person, where the client is an executor. *Burleigh v. Palmer*, 74 Neb. 122. If an attorney employed by an executor can satisfy his lien out of money in his hands, but belonging to the estate, why should not the estate answer to him directly, where no money to which a lien can attach comes into his possession? Having, at the request of executors charged with the duty of executing a will, performed services on behalf of the estate, why, in recovering his fees, should he be driven to the circuitous course of first pursuing the executor personally and afterward the estate itself? Under the constitution and statutes the county court in the settlement of estates of deceased persons has the powers of a court of chancery. *Williams v. Miles*, 63 Neb. 859. In the exercise of this jurisdiction the services of counsel may be absolutely essential to the proper protection of the estate, and in passing on claims the power of the court to prevent any wrongful or unreasonable charge by an attorney is complete. Where the services of an attorney are necessary in the settlement of an estate of a deceased person, he should not be unnecessarily hampered in his employment or in the collection of his fees. Where the estate is ultimately chargeable with attorney's fees which the executor

First Nat. Bank v. Golder.

refuses to pay or approve, the better rule under the constitution and statutes of this state is that an itemized bill therefor may be presented to the county court and allowed as a claim against the estate, in so far as the charges are reasonable and just. In this view of the law, plaintiffs' petition on appeal to the district court is not demurrable. The reasons for this conclusion have already been applied to the allowance of attorneys' fees out of the estate of a ward. *McCoy v. Lane*, 66 Neb. 847. In principle the case cited does not differ from the present one. In holding that the petition did not state a cause of action, the trial court was in error.

The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FIRST NATIONAL BANK OF SCRIBNER, APPELLEE, v. GEORGE
A. GOLDBER ET AL.; OSCAR C. HOPPER, APPELLANT.

FILED MAY 23, 1911. No. 16,467.

1. Appeal: STRIKING PARAGRAPH OF ANSWER. An order striking a paragraph from an answer is not erroneous, where the matter thus eliminated is pleaded in other parts of the same answer.
2. ———: INSTRUCTIONS: WAIVER. On appeal, a defense that the note on which the action is based was never delivered is unavailing, where defendant failed to except to an instruction that the delivery is conclusively established by the evidence.
3. ———: CONFLICTING EVIDENCE. A fact determined by a jury upon conflicting evidence is conclusive on appeal, unless the finding is manifestly wrong.
4. Notes: CONSIDERATION. A consideration moving to one of several joint makers of a promissory note is good as to all.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Henry M. Kidder, for appellant.

G. L. Loomis and *H. O. Maynard*, contra.

ROSE, J.

This is an action on a promissory note for \$263.50, dated July 11, 1905, and due September 1, 1906. The names of the makers are George A. Golder, Charles K. Huntington and Oscar C. Hopper. J. L. Reinard was payee, and he immediately indorsed the note to the First National Bank, Scribner, of which he was cashier. The summons was served on Hopper alone, and he is the only answering defendant. A trial resulted in a verdict and judgment against him and in favor of the bank for the amount of the note and interest, and he has appealed to this court.

Hopper admitted that he signed the note, but pleaded that he did so without consideration. The nature of his defense is shown by the third and fourth paragraphs of his answer, which are as follows:

"3. This defendant for a further defense to plaintiff's action alleges that the said promissory note was executed by defendant George A. Golder as one part of an executory contract; that the said contract was an application for life insurance made to the Security Mutual Insurance Company of Lincoln, Nebraska, which, together with the promissory note described in plaintiff's petition, was a proposition to the said insurance company to issue its policy of insurance upon the life of said George A. Golder; and that, at the time of the signing of the said promissory note by this defendant, the said application for insurance and the said promissory note had not been submitted to the said Security Mutual Insurance Company and had not been accepted by the said insurance company, and the said Security Mutual Insurance Company had not issued its policy upon the life of defendant George A. Golder. Therefore this defendant alleges that the said promissory

note was without consideration, and the said promissory note was not delivered, and therefore void; and that the plaintiff knew of the facts herein alleged, and plaintiff was not at that time, and is not now, the owner and holder of the said promissory note in good faith.

"4. This defendant, for a further defense to plaintiff's action, alleges that he signed the said promissory note upon the request of plaintiff, through J. L. Reinard, its cashier and managing officer, and for the accommodation of said J. L. Reinard and the plaintiff, and upon the representations made by the said J. L. Reinard for himself and the plaintiff that the said George A. Golder, the maker of said note, was solvent, that there was no liability upon the part of this defendant by signing said note, and for the accommodation of said J. L. Reinard and plaintiff that the said note would bear the name of a resident of Dodge county, Nebraska, so that the note would pass the examination of the bank inspectors and be approved; that the signing of said note by this defendant was without the knowledge or consent of defendant George A. Golder, or of the said Security Mutual Insurance Company; that, depending upon the representations made by the said J. L. Reinard, as herein set out, and upon the request, as herein alleged, this defendant signed the said note; that, because of the matters herein alleged that as accommodation maker for the accommodation of the plaintiff and J. L. Reinard, there is no liability on the part of this defendant to the plaintiff on the said promissory note; that, because of the representation on the part of said J. L. Reinard that there was no liability on the part of this defendant by signing the said note, the plaintiff is estopped from now asserting that there is now a liability; that plaintiff is estopped from alleging that this defendant is a surety on said note for defendant George A. Golder, or is a joint maker with the said Golder."

1. On motion of plaintiff, the court struck from the answer the fifth paragraph thereof, and of this ruling complaint is made. The allegations herein quoted from

the answer contain in a different form the substance of the paragraph eliminated in the manner stated. For this reason, the judgment will not be reversed on the ground urged.

2. A considerable portion of defendant's argument is devoted to the defense that the note was never delivered. It is insisted that non-delivery is established by the evidence. Defendant admits that he signed the note. The proof that it was duly delivered is at least sufficient to sustain a finding against defendant on this issue. The jury were instructed: "The execution and delivery of this note to the plaintiff by defendant Hopper is conclusively established by the evidence." No objection was made to the giving of this instruction. Having been satisfactory to defendant when the case was submitted to the jury, it is now too late to urge the defense that there was no delivery.

3. The judgment is also assailed as erroneous because the evidence, from the standpoint of defendant, establishes the fact that he signed the note for the accommodation of plaintiff at the request of plaintiff's cashier, relying upon the latter's statement that Golder, the maker, was solvent, and upon an agreement that he assumed no liability. Defendant adduced testimony tending to establish this defense, but the material proof in support of it is directly contradicted by plaintiff's cashier. There is also proof of these facts: Huntington was an agent of the Security Mutual Insurance Company, and as such procured Golder's application for life insurance in the sum of \$5,000. The applicant could not pay the first year's premium in cash and the note was executed to raise money for that purpose. The assurer did not accept notes for premiums. To meet the emergency, Huntington asked the bank to discount the note when it bore the signatures of himself and Golder. The bank rejected such security as insufficient. Hopper is a physician, and was at the time an examiner for the assurer named. He signed the note at the solicitation of Huntington to make it bankable, and became liable to plaintiff for its payment. Im-

mediately afterward, the bank discounted the note and sent the proceeds to the insurer. The latter received the money and sent the policy to Golder. The insurance was in force until forfeited for nonpayment of the second year's premium.

The issue to which this conflicting testimony was directed was submitted to the jury, and their finding was against defendant. For the purposes of review, it settled the fact adversely to him.

4. The following instruction is challenged as erroneous: "If the jury believe from the evidence that the defendant Hopper signed said note at the request of one of the other signers, Huntington, then in that case the consideration received by the other signer, Golder, would be a sufficient consideration for the defendant Hopper for signing said note, and the defendant Hopper in that case would be liable for the full amount of said note and interest thereon."

This instruction was applicable to the evidence, and was not prejudicial to defendant, when considered with another instruction in which the jury were directed to return a verdict in his favor, if they believed from the evidence that he signed the note at the request of plaintiff for the purpose of making it conform to the requirements of the bank examiners, with the understanding on part of plaintiff that defendant was not to become liable on it. The instruction quoted is in harmony with the rule that a consideration moving to one of several joint makers of a promissory note is good as to all.

All questions presented have been considered and no prejudicial error has been found in the record.

AFFIRMED.

FAWCETT, J., not sitting.

CHARLES F. EISELEY, APPELLANT, V. NORFOLK NATIONAL
BANK ET AL., APPELLEES.

FILED MAY 23, 1911. No. 16,419.

1. **Attachment: RATIFICATION BY DEBTOR.** Where a defendant in attachment does not in such action assail the validity of the attachment, or the truthfulness of the affidavit upon which it is based, but within a few days after the levy of such attachment voluntarily executes and delivers to the attachment creditor, or to the attorneys of such creditor for his benefit, a bill of sale of all of the attached goods and chattels, subject to certain other indebtedness of and judgments against such attachment debtor, he thereby ratifies and confirms such attachment, and cannot thereafter proceed against the judgment creditor or the surety upon the attachment bond for damages claimed to have been sustained by reason of an alleged unlawful and fraudulent procurement and levy of such attachment.
2. ———: **DIRECTING VERDICT.** Evidence examined and referred to in the opinion held sufficient to sustain the action of the trial court in directing a verdict for the defendant, and sufficient to sustain the judgment entered thereon.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Affirmed.*

W. V. Allen and W. L. Dowling, for appellant.

M. D. Tyler, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Madison county against the Norfolk National Bank and the defendant Rainbolt to recover damages for an alleged wrongful attachment levied upon plaintiff's stock of hardware in the city of Norfolk, the bank being the plaintiff in such attachment suit, and defendant Rainbolt surety upon the attachment bond. The case was subsequently dismissed as to the bank, and the trial proceeded against defendant Rainbolt individually. After both sides had

Eiseley v. Norfolk Nat. Bank.

rested, defendant moved for a directed verdict in his favor. The motion was sustained, and from a judgment entered upon the verdict so returned plaintiff appeals.

The pleadings, the evidence, the assignments of error, and the briefs in this court are all unnecessarily voluminous and will not be referred to in detail. As we view the record, after a very careful examination of the same, the real questions involved are quite simple. The record shows that for a number of years prior to September 25, 1896, plaintiff had been engaged in the hardware business in the city of Norfolk. According to his own testimony, plaintiff's business for the two years immediately prior to said date had not been as profitable as in previous years, and, notwithstanding the fact that plaintiff had reduced his stock \$1,000 during the two years prior to the date named, he had not been able to promptly meet his liabilities. During the last three months of 1895 at least three of plaintiff's creditors had reduced their claims to judgments against him in the county court of Madison county. The answer of defendant sets out these judgments. The return of the sheriff upon the attachment sued out by the bank shows that the attachment was levied September 26, subject to a prior levy on the day preceding under executions upon four judgments, viz., the three judgments set out in the answer, and one in favor of George Bishop for \$142. At the time of levying the executions above referred to, on September 25, 1896, possession of the stock was taken by the sheriff. On the next morning, September 26, the bank obtained a writ of attachment and placed the same in the hands of the sheriff, who at once levied the same, subject to his levy under the four executions set out in his return. Plaintiff testified that the attachment was procured without his knowledge and in the face of an assurance given by him on the evening of the 25th, after the executions had been levied, that he would pay the bank's claim of \$1,500 and accrued interest on the next morning. Upon the trial plaintiff introduced as a witness Mr. W. H.

Eiseley v. Norfolk Nat. Bank.

Bucholz, who at the time the attachment was levied was cashier of the bank, but who now has no connection therewith. He testified that on the evening before the attachment was issued, and after the executions had been levied, he called upon plaintiff at plaintiff's residence, and had a general talk with him about his affairs generally; that in that conversation they discussed plaintiff's financial situation, "trying to find some way by which we could save part of the stock that was being threatened, the stock of goods, and apply the proceeds on his home, the mortgage upon his home, in order to save the home for Mr. Eiseley." He further testified: "I urged him, if he was going to have trouble, to give the bank a preference lien on that \$1,500, and have that secured by the stock in addition to what we already had, and he said he couldn't do that because he had promised Mr. Mann, he had given his word he would not give anybody any security on that stock that night or that day. Then I proposed that we talk over the attachment, and he said that could be done without his violating his word; to go ahead." Notwithstanding Mr. Bucholz had been introduced as a witness by plaintiff and his veracity thereby vouched for, plaintiff was subsequently permitted to contradict this testimony given by him. We do not think that under the evidence appearing in this record any weight can be given to this attempted contradiction by plaintiff of a reputable witness whom he had himself placed upon the stand. As has been said, the attachment was levied on the morning of September 26. Two days later, on September 28, plaintiff and the firm of Powers & Hays, attorneys representing both the judgment creditors and the attaching creditor, took the matter up in the office of the attorneys, and as a result of that interview plaintiff executed and delivered to Powers & Hays a bill of sale of all of the personal property which had been levied upon under the executions and attachment, subject to an account of \$200 and interest to the I. L. Elwood Manufacturing Company; a judgment of \$111.90, with interest and costs, in favor of the C. Sydney

Eiseley v. Norfolk Nat. Bank.

Shepherd Company; a judgment of \$309.81, with interest and costs, in favor of the Michigan Stove Company; a judgment of \$109.40, with interest and costs, in favor of the Northfield Knife Company (the three judgments set out in defendant's answer); and a note (upon which the attachment was based) in favor of the Norfolk National Bank for the sum of \$1,831.25, and the interest accrued and to accrue thereon. When this bill of sale was executed and delivered to the attorneys, the levies under the executions and attachment were all released, and Powers & Hays took possession of the stock of hardware under the bill of sale. In something less than two months thereafter, the sheriff levied upon this stock, then in the hands of Powers & Hays, under a tax distress warrant against the plaintiff, covering taxes from 1891 to 1896, aggregating about \$490, took possession of the stock under such levy and sold the same.

On November 13, 1897, plaintiff commenced an action in the district court for Madison county against the bank and Powers & Hays and the sheriff, Joseph J. Clements, to recover the value of the stock of hardware in controversy, on the ground that said defendants had converted the same to their own use. The petition in that case set out the execution and delivery of the bill of sale above referred to, and the taking possession of the stock thereunder by Powers & Hays. That case proceeded to trial, and resulted in a judgment in favor of defendants therein, the Norfolk National Bank and Powers & Hays, and against Sheriff Clements for the full value of the stock, which judgment Mr. Clements paid in full.

On September 28, 1898, plaintiff filed in the United States district court for the district of Nebraska a voluntary petition in bankruptcy. In that case he scheduled a large amount of liabilities, and no assets except \$100 of exempt property consisting of "necessary household and kitchen furniture." He was duly adjudged a bankrupt and in due course obtained his discharge.

The above facts are, with the exception of the claim

that the attachment was levied with the prior consent of plaintiff, either admitted or indisputably established. Plaintiff claims that the affidavit, upon which the attachment was issued, was false, and that in obtaining such attachment the bank "acted unlawfully, wilfully, wrongfully, and maliciously and without probable cause, whereby the plaintiff sustained damages in the sum of \$3,025"; that by reason of said attachment plaintiff's stock of hardware, which he alleges was of the then fair cash value of \$3,000, was entirely lost; that plaintiff's business as a retail hardware merchant, which he alleges was then of the actual and fair value of \$2,500 per annum, was totally destroyed and rendered valueless; that plaintiff's store building in which said stock was kept was locked up by the sheriff under said writ of attachment, and occupied by the bank with said stock for the period of two months, whereby plaintiff lost the rent of said building for that time, of the reasonable and fair value of \$60; that the bank through its officers, agents and attorneys, while the stock was being held under said writ, removed from said stock \$200 worth which has never been accounted for; that, while the stock was in the custody of the sheriff under said writ of attachment, the bank wrongfully, unlawfully and wilfully permitted the sheriff to levy a tax distress warrant on a part of the same for \$234.63, personal taxes due from the plaintiff to the county, the money to pay which plaintiff had given the said bank under its promise that it would pay said taxes. The evidence indisputably shows that the last item referred to had been given to the bank to pay the taxes upon certain real estate of the plaintiff, and that the same had all been paid by the bank and the surplus of \$4 or \$5 placed to plaintiff's credit upon his open account. The goods claimed to have been removed from the stock were not removed during the time the sheriff was in possession under the writ of attachment, but consist of an amount of less than \$200, received from the sale of a portion of the goods by Powers & Hays, after they had

taken possession of the stock under their bill of sale. The item of \$60 for rent is equally without merit, as the total time that the sheriff was in possession, under both the executions and writ of attachment, was only three days. During all of the rest of the time the possession of the store building was by Powers & Hays under the bill of sale which had been voluntarily given them by plaintiff. The item for the value of the stock taken was fully adjudicated and a full and complete recovery therefor had by plaintiff in the litigation above referred to, which resulted in the judgment against the sheriff, and which was fully paid.

This leaves the only item for consideration plaintiff's claim for the destruction of his business, which, as plaintiff states in his brief, is "the gist of the damage claimed in this action." We are unable to discover any ground upon which this claim can be sustained. The bank did not close or stop the running of plaintiff's business. That was effectually done on the previous day by the possession taken by the sheriff under his executions. In addition thereto, we think that the action of the sheriff in levying the executions and of the bank in suing out and levying its writ of attachment were all acquiesced in and ratified by the voluntary bill of sale given by plaintiff two days later to Powers & Hays for the very purpose of enabling them to dispose of the stock and settle the claims of the judgment and attachment creditors, and in consideration for which bill of sale the levies of the executions and attachments were all released. If the attachment had been issued "unlawfully, wilfully, wrongfully, and maliciously and without probable cause," and was based upon a false affidavit, plaintiff could have had those matters determined in that action, and, if his allegations are true, could have fixed the liability of the bank, and of defendant Rainbolt as surety upon the attachment bond. He did not see fit to pursue that course, but, instead, voluntarily sold and assigned all of his right, title and interest in the goods attached to the attorneys of the attaching

creditor for the benefit of the latter, and thus obtained the discharge of the attachment. We do not think such a course of procedure can be held to lay a foundation for an action for damages against the attaching creditor or upon the attachment bond for a wrongful levy of such attachment. The attachment was levied September 26, 1896. It was discharged, as the result of plaintiff's voluntary act, September 28, 1896. This action was not instituted until September 24, 1906. We are unwilling to give our approval to such a course of procedure. We do not find anything in the record to indicate that the bank was attempting to obtain any undue advantage of the plaintiff, but, on the contrary, it appears to have been his friend to the extent of standing by him for nearly a year after he had suffered judgments to go against him, and, when it resorted to attachment, as shown by the testimony of Mr. Bucholz, it did so in an attempt to aid rather than to further embarrass him.

It would serve no good purpose to review any of the other questions discussed in briefs of counsel. We have examined all of the assignments of error as to the rulings upon the pleadings and in the admission and exclusion of evidence, and find no prejudicial error in any of them. The court may have erred in its rulings as to the effect of the bankruptcy proceedings, but it is immaterial to discuss that point, for the reason that, in the conclusion reached, we have proceeded upon the theory (without actually deciding the point) that plaintiff was right in that contention, and that the bankruptcy proceedings did not divest him of his claim, if any he had, by reason of the suing out of the attachment by the bank. Under the undisputed evidence, there was no question of fact for the jury to determine; hence, the trial court did right in directing a verdict for the defendant.

The judgment of the district court is therefore

AFFIRMED.

BARNES, J., took no part in the decision.

LETTON, J., concurs in the conclusion.

MARY B. HOWELL, APPELLEE, v. ANNA K. BOWMAN, APPELLANT.

FILED MAY 23, 1911. No. 16,431.

1. **Landlord and Tenant: EVIDENCE.** Where in an action of forcible entry and detention the defense that a lease signed by defendant was obtained by duress is established, but it further appears that soon after signing such lease defendant told her attorney of the circumstances under which the same was signed, and continued for a period of seven months thereafter to pay rent monthly to the lessor named in such lease, without protest or any act of repudiation, *held* a ratification of the lease as made and sufficient to sustain a judgment establishing the relation of landlord and tenant between the parties thereto.
2. **Appeal: FINDINGS.** The findings of the trial court, in a law action, supported by competent evidence, will not be set aside simply because it does not comport with the conclusion which this court, as triers of fact, might have reached.
3. ———: ———. In order to justify a reversal of the findings of the court below, in a law action, on a question of fact, such findings must be shown to be clearly wrong.
4. **Trial: REQUESTS FOR DIRECTED VERDICT: WAIVER.** Where each party to a trial requests the court to direct a verdict in his favor, he waives the right to thereafter insist that any question of fact should have been submitted to the jury.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

G. W. Shields, for appellant.

T. W. Blackburn, contra.

FAWCETT, J.

This is an action of forcible entry and detention commenced in justice court in Douglas county. Judgment was there entered for plaintiff, and defendant appealed to the district court, where trial was had to the court and a jury. When both sides had rested, plaintiff and defendant each moved for a directed verdict. The motion of

defendant was overruled and that of plaintiff and a verdict of guilty directed in favor of plaintiff. From a judgment entered upon such verdict, defendant appeals.

The controlling questions in this case are: First, did the relation of landlord and tenant exist between defendant and plaintiff or between defendant and Catherine E. Henneberry, from whom by mesne conveyances plaintiff derived title to the property in controversy? and, second, was defendant duly served with the statutory three days' notice to quit prior to the commencement of this action in justice court? The record shows that defendant's father, with his family, of which defendant was a member, entered into possession of the premises in 1867. Defendant's mother, father and brother all died there, the father in 1886 and the brother in 1890. Ever since the death of her brother defendant has resided there alone. A lease was introduced in evidence, dated August 16, 1905, signed by Catherine E. Henneberry, by Garvin Brothers, agents, and by defendant. Defendant testified that on the morning of that day one of the members of the firm of Garvin Brothers, James Allen, deputy United States marshal, and A. R. Hensel, a constable, came to her home; that they took hold of her furniture and said they were going to set it out in the street unless she signed that lease; that she could not communicate with her attorney, and did not know what to do; that they insisted upon her signing it, and she finally said: "I will sign this under protest." The blank space in the lease for designating the amount of rent to be paid thereunder is blank, but defendant testified that she paid \$1 a month. The lease was for one month, from August 16, 1905, to September 16, 1905.

This lease is vigorously assailed by counsel for defendant at being without consideration and as having been "conceived in fraud, bad faith, brutality, and duress;" language which we think is fully justified by the circumstances attending its execution. Mr. Garvin and Mr. Allen were not put upon the stand to contradict the testimony of defendant. Constable Hensel was introduced as a witness,

and the only contradiction he gave was that nothing was said about duress. It appears therefore that these three able-bodied men, two of them well known officials, swooped down upon this lone woman on that morning, and coerced her into signing the lease in order, as she believed, to prevent having her furniture set out upon the street. If the establishing of the relation of landlord and tenant between defendant and Mrs. Henneberry depended alone upon the signing of the lease and the payment of one month's rent upon that day, we would have no hesitation in holding that neither Mrs. Henneberry nor any of her grantees obtained any rights thereunder; but defendant testified that, after the execution of this lease, she told her attorney about it, before the commencement of this suit. "Q. When did you tell him, near, about when? A. Oh, perhaps a month or more. Q. What did he say to you? Go on and pay the rent? A. I do not know what he did say. Q. You did not stop paying the rent after he told you? A. No. Q. You went right on? A. Yes, sir. Q. You continued to pay the rent without any protest further than what you have stated up to and including some time in April, 1906? A. I did not consider that it was necessary. Q. Answer the question, you did do that? A. Yes, sir." It appears therefore from her own testimony that about a month after she had been coerced into signing the lease she told her attorney about it, and yet she continued, thereafter, to pay the rent from month to month for about seven months longer, or about eight months in all, without repudiating the lease or ever again entering any protest. She was not acting under duress when she made these subsequent monthly payments of rent. This was clearly a ratification of the lease, and we see no escape from holding that the relation of landlord and tenant thereafter existed between defendant and Mrs. Henneberry and the latter's grantees.

Section 1022 of the code, relating to actions of forcible entry and detention, provides: "It shall be the duty of the party desiring to commence an action under this chap-

Howell v. Bowman.

ter, to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least three days before commencing the action, by leaving a written copy with the defendant, or at his usual place of abode if he cannot be found." The notice served in this case was dated November 8, and required defendant to vacate the premises in controversy within four days from the time such notice should be served upon her. A copy of the notice was introduced in evidence, with the indorsement thereon by constable Hensel that he served the notice November 9, 1907, by leaving a true copy of the same at the usual place of residence of defendant. Hensel was called as a witness, and the substance of his testimony on direct and cross-examination is that, when he went to defendant's residence to serve the notice, he rapped first on one door and then on another, and that, getting no response, he inquired at the place next door and at Hayden's warehouse across the street, and then went and put the notice under defendant's door. When plaintiff was introducing her evidence in rebuttal, Hensel was again placed upon the stand, and then testified that he went to defendant's residence twice that day, once in the morning and the second time in the afternoon, and was unable to obtain any response to his raps either time. He says, upon this last examination, that he served the notice in the afternoon, but of this we entertain some doubt. His testimony, when he was upon the stand the first time, indicates pretty clearly that the notice was put under the door at the time of his first visit, if indeed he made a second visit. His testimony the second time looks very much like an attempt to bolster up his testimony given in chief.

However that may be, this is a law action, and we have repeatedly held that we will not set aside a verdict or the findings of a trial court, unless such verdict or findings are clearly wrong, even though we might have found differently had we been sitting as the triers of fact. The trial court held that the notice in question was duly served, and we cannot say that such holding is clearly wrong.

Fitzgerald v. Union Stock Yards Co.

It is urged in defendant's brief that, "if the proof of notice to quit in the manner provided by the law was not satisfactory, or was not such as to leave no other reasonable inference in any ordinary mind than that the notice was properly given, then the case should have been submitted to the jury on proper instructions, and the peremptory instruction for the plaintiff was error.". This would be true but for the fact that, by the mutual motions of the parties for a directed verdict, all questions of fact involved in the case were withdrawn from the jury and submitted to the court for its determination. *Dorsey v. Wellman*, 85 Neb. 262; *Phenix Ins. Co. v. Kerr*, 129 Fed. 723; *Martin v. Harvey*, ante, p. 173.

Upon a consideration of the whole case, we reluctantly conclude that the judgment of the district court should be, and it is,

AFFIRMED.

LETON, J., concurs in the conclusion.

MARY FITZGERALD, ADMINISTRATRIX, APPELLANT, v. UNION
STOCK YARDS COMPANY, APPELLEE.

FILED MAY 23, 1911. No. 16,360.

1. Judgment: SATISFACTION: JOINT WRONGDOERS. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had.
2. Torts: SETTLEMENT: JOINT TORT-FEASORS: RELEASE. If one of several joint wrongdoers makes full payment of damages caused by injury done, there can be no further recovery for the same injury.
3. ———: ———: ———: ———. If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.
4. ———: ———: ———: ———. Settlement with one of several joint wrongdoers and payment of damages is not a defense to an

Fitzgerald v. Union Stock Yards Co.

action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement; affixing a private seal to such writing is without effect.

5. **Trial: DIRECTING VERDICT.** If the evidence is substantially conflicting upon a material issue, it presents a question for the jury. Evidence in this case is found to be insufficient to justify the court in directing the verdict.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Reversed.*

Smyth, Smith & Schall, for appellant.

Greene, Breckenridge & Matters, contra.

SEDGWICK, J.

Martin Fitzgerald, a young man about 23 years of age, was in the employ of the Chicago, Burlington & Quincy Railroad Company as a switchman in the yards at South Omaha. Because of a defect in one of the cars of the company, it was necessary to use a chain in coupling it with the tender of the engine, and Fitzgerald was directed by the foreman to go between the car and the tender for that purpose. While he was so employed, the defendant company drove a train of cars against the train on which he was working, which forced the car and locomotive together and instantly killed him. His mother, the plaintiff, as administratrix of his estate, brought this action against the defendant for damages caused by his death. The defendant denied that it was negligent, and alleged that this plaintiff and the father of the deceased had brought an action against the Chicago, Burlington & Quincy Railroad Company upon the same cause of action, and that the negligence of the defendant in that action was the cause of the injury complained of, and that the same parties also brought an action against the same railroad company as beneficiaries of the relief department of that company, and

Fitzgerald v. Union Stock Yards Co.

that afterwards both of the said actions were settled, and that the railroad company paid the plaintiff \$4,400 in full settlement of the damages caused by the death of the said Fitzgerald, and \$2,200 in full settlement of the benefits to which they were entitled from the relief fund. Upon the conclusion of the evidence, the court instructed the jury to find a verdict for the defendant. The plaintiff has appealed.

The parties agree that there are three principal questions to be determined in the case: 1. Were the defendant and the railroad company jointly liable for the death of the deceased; that is, were they joint tort-feasors? 2. If they were joint tort-feasors, could the plaintiff settle with and release one of them without releasing the other? 3. If the plaintiff could settle with and release the railroad company from liability, and at the same time reserve its right of action against this defendant, is the testimony in the case sufficient to establish that it was the intention and agreement of the parties to settle with and release only the railroad company and reserve a right of action against this defendant? It was also contended by the defendant that in any event the evidence was not sufficient to show that this defendant was negligent, and that that negligence was the proximate cause of the injury complained of.

Upon the first question there is some controversy in the evidence, and we do not find it necessary to discuss this evidence in view of our conclusion upon the second proposition. If both parties are liable for the same injury, they are jointly and severally liable; that is, for the purposes of the case, they are joint tort-feasors. It is conceded in the pleading and briefs that the railroad company was liable. If this defendant was not guilty of negligence which was the proximate cause of the death of young Fitzgerald, then that of itself is a sufficient defense in this action.

If it is conceded that the railroad company and this defendant were joint tort-feasors, would the settlement with the railroad company operate as a release of this defend-

Fitzgerald v. Union Stock Yards Co.

ant? While the action of Mr. and Mrs. Fitzgerald, as the parents of the deceased, was pending against the railroad company, they compromised with the railroad company by an agreement in writing, called a receipt and contract of settlement and release, as follows:

"Burlington Route. Feb., 1908. Audit Number, 253. Department Number F. B. T. 1468. Chicago, Burlington & Quincy Railroad Company, Lines West of the Missouri River. 2-29-08.

"To Mary Fitzgerald, as administratrix of the estate of Martin J. Fitzgerald, deceased, Edward A. Fitzgerald and Mary Fitzgerald, father and mother of said deceased. South Omaha, Nebraska. Paid Voucher. This is to certify that I, Mary Fitzgerald, as administratrix of the estate of Martin J. Fitzgerald, deceased, have this day received from the treasury of the Chicago, Burlington & Quincy Railroad Company, the sum of forty-four hundred (\$4,400) dollars. And this is to certify that we, Edward A. Fitzgerald and Mary Fitzgerald, father and mother of said deceased, have this day received from the relief fund of the relief department of said company draft No. 30,984, for twenty-one hundred (\$2,100) dollars, same being amount of death benefit due us as beneficiaries of said deceased. And in consideration of the above payments, we, Mary Fitzgerald, as such administratrix, and Edward A. Fitzgerald and Mary Fitzgerald, as such father and mother, hereby acknowledge full payment, settlement, release and satisfaction and discharge of all claims and demands of any nature whatsoever, which we, or either of us, as such administratrix or as such parents, may have or claim to have either against the Chicago, Burlington & Quincy Railroad Company or its said relief department, or both of them, arising from, growing out of or to grow out of the death of Martin J. Fitzgerald aforesaid, from injuries inflicted upon his person by reason of his being struck, run over and crushed by switching train in yards at South Omaha, Nebraska, on or about October 15th, 1907. Member R. D. Draft No. 1187. Claim No. F. D.

Fitzgerald v. Union Stock Yards Co.

50, Neb. Approved: B. F. Thomas. Approved: James E. Kelby. Approved: H. D. Foster, Asst. Auditor."

"Contract of Settlement and Release. Whereas, I have agreed upon a settlement of all claims against the Chicago, Burlington & Quincy Railway Company arising from the circumstances set out in the foregoing memorandum, which is made a part of this agreement, and in said settlement have included all damages sustained by me, those not yet ascertained or developed, if any there shall be, as well as those now known, and also have included and settled all other causes of action at this date existing in my behalf against said company, whether arising upon contract or tort, and whether like or unlike the demand specifically referred to above: Now, in consideration of the payment to me of forty-four hundred dollars (\$4,400) hereby acknowledged and declared to be the full and only consideration moving to me, the receipt of which is hereby acknowledged, I do hereby release and forever discharge the Chicago, Burlington & Quincy R. R. Company, its lessors, lessees and controlled companies, and its and their officers, employees, relief department, successors and assigns, of and from all debts, suits, causes of action, claims and demands whatsoever, at law or in equity, which I now have, or to which I may hereafter become entitled on account of the circumstances above set out including damages not yet ascertained or developed, if any there shall be, as well as those now known, and also of and from all or any other causes or things to this date, whether like or unlike the premises, and whether arising in contract or in tort. In witness whereof I have hereunto set my hand and seal this 29th day of February, 1908. Read to the said Mary Fitzgerald, Admrx., etc., and Edward A. Fitzgerald, and subscribed by him in our presence, this 29th day of February 1908. Mary ^{her} X Fitzgerald, as administratrix
^{mark}
of the estate of Martin J. Fitzgerald, deceased. Witness: Mary Fitzgerald. Edward A. Fitzgerald, Father. Mary ^{her} X Fitzgerald, Mother. Witness for Edward A.
^{mark}

Fitzgerald, and for mark of Mary Fitzgerald: O. J. Smith."

This court, so far as we have noticed, has not considered and determined the precise question involved. In *Wardell v. McConnell*, 25 Neb. 558, the syllabus is as follows: "The rule is that where the damages are uncertain, accord and satisfaction before judgment by one of several joint wrongdoers is satisfaction as to all; but the discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." The point involved in the case and decided by the court is stated in the last paragraph of the syllabus: It is said in the opinion that "the testimony fails to show that Huber had ever sold intoxicating liquor to J. B. McConnell, the husband of the plaintiff in that action, and it is expressly proved that Mrs. McConnell had no facts in her possession at the time of bringing the action to justify her in joining Huber as defendant, and if the testimony before us is to be believed, a verdict must have been rendered in his favor.

The opinion cites *McReady v. Rogers*, 1 Neb. 124, in which it is stated: "Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had." In *Iddings v. Citizens State Bank*, 3 Neb. (Unof.) 750, *Wardell v. McConnell*, *supra*, is cited, and the point decided in that case is reaffirmed in these words: "The discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." It must not be inferred therefore from these cases that this court has passed upon the question whether a settlement and release of one of several joint wrongdoers will necessarily amount to an accord and satisfaction of all damages suffered, and so discharge all of the parties liable therefor. In *Lovejoy v. Murray*, 70 U. S. 1, the following propositions are decided: A judgment not fully satisfied against one or more co-tresspassers is no bar to an action against one not joined in the first suit. Persons engaged in committing

the same trespass are joint and several trespassers, and not joint trespassers exclusively. Satisfaction accepted in full for injury done precludes plaintiff from second recovery for same damages, though he may have obtained two or more judgments for the same tort. This is the leading case in that court upon those propositions, and has been followed as such in subsequent cases in that court, and in the various state courts.

In the case at bar we have a complete settlement and release of one of the parties liable from all claims of damage arising from one injury caused, as we are now supposing, by the joint action of several parties. Whether this should operate as release of all the parties jointly liable is a question that has been much discussed by the courts in this country and in England, and upon which there have been conflicting opinions. In ancient times it was quite uniformly answered in the affirmative. Such releases were usually formal and executed under seal; and, if they recited that all the damages occasioned by the injury had been satisfied, they were held to be conclusive upon the parties executing them. The rule then was, as it has since universally been held to be, that a party was not entitled to more than one satisfaction for an injury done him. If the injury had been fully compensated, he had no further right of action, and the release executed under seal acknowledging full compensation for the injury could not be contradicted or explained. It would seem that, if the courts in later decisions had kept this principle in mind, some of the uncertainty of the law upon this question might have been avoided. If a settlement by one of several joint wrongdoers, in which he admitted that the damages caused by the wrong done amounted to a certain specified sum, was not conclusive against the other wrongdoer, it is a little difficult to understand by what reasoning it could be made conclusive in his favor. It would seem that the real question would be whether the party injured had in fact been fully compensated for his injury, and his admission that his injury was limited to a certain sum, which

admission was made for the purpose of obtaining a settlement with one of the parties who caused his injury, might under some circumstances have been considered open to explanation. When, however, he made such admission with due solemnity and under seal, it was in the earlier cases, at least, held to be conclusive against him. There is reason in holding that, if one of the joint wrongdoers acted for all and assumed to settle the whole matter and make full settlement of all claims of the injured party, such settlement might be binding upon all parties. We do not see upon principle why a part satisfaction and release of one wrongdoer should operate in favor of other wrongdoers. It is generally held that there is no right of contribution existing between wrongdoers, and the collection of part satisfaction from one is not an injury, but rather a benefit, to the others. It is not the policy of the law to encourage litigation, but rather to favor settlement. Several wrongdoers who are jointly and severally liable for the injury done may not agree as to their liability, nor as to the desirability of adjusting the matter. Some of them might be willing to compromise with the injured party by paying a just proportion of the whole damage done, and be unwilling or even unable to pay the whole damage. Some men are quite eager for litigation; others will do anything reasonable to avoid it. If some of the wrongdoers are willing to adjust the matter by paying their reasonable proportion of the damage done, and the injured party can accept such payment and still reserve his claim against the more stubborn ones, such a construction of the law would seem to facilitate settlement and tend to avoid litigation. This idea is stated and elaborated in *Louisville & Evansville Mail Co. v. Barnes' Adm'r*, 117 Ky. 860. See, also, *Bloss v. Plymale*, 3 W. Va. 393; *Robertson v. Trammell*, 37 Tex. Civ. App. 53, 83 S. W. 258; *O'Shea v. New York C. & St. L. R. Co.*, 105 Fed. 559; *Carey v. Bilby*, 129 Fed. 203; *Gilbert v. Finch*, 173 N. Y. 455, 61 L. R. A. 807; *Home Telephone Co. v. Fields*, 150 Ala. 306, 43 So. 711; *El Paso &*

S. W. R. Co. v. Darr, 93 S. W. (Tex. Civ. App.) 166; *City of Chicago v. Babcock*, 143 Ill. 358. In 24 Am. & Eng. Ency. Law (2d ed.) 307, the law is stated as follows: "But it is a well-settled rule that, where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releasor has received was received in full satisfaction of his wrong; and, if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrongdoers." Private seals do not affect the equity or legality of written instruments or contracts in this state. Comp. St. 1909, ch. 81, sec. 1. If this defendant was not a joint trespasser with the railroad company, it is conceded that the defense of settlement fails, and that, if defendant's negligence was the proximate cause of the injury, the court should have submitted the case to the jury with instruction to ascertain the amount of the plaintiff's damages, and, after allowing the amount that had been received thereon, find their verdict for the remainder.

If the defendant and the railroad company were joint tort-feasors, as we have assumed in this discussion, the question is: Has the plaintiff been fully recompensed for the injury done? If the plaintiff received this money from the railroad company as full compensation for the damages caused by the injury complained of, and agreed with the railroad company to so receive it, and the parties were jointly liable for the wrong done, it would seem that the authorities generally hold that she is bound by that agreement, and cannot now maintain this action against this defendant, even though this defendant did not directly nor indirectly take any part in the settlement or contribute anything towards the consideration therefor. It was held by this court in the cases cited above that, even where there had been an accord and satisfaction with one party for the injury done, and that party formally released, it would not operate as a defense for the party whose wrongful act caused the injury, unless the party released was also in

fact a joint wrongdoer. If this principle is conversely stated, an injured party who releases one of several joint wrongdoers from liability, for a consideration which he agrees to accept as full compensation for the injury done, thereby releases all who were jointly and severally liable therefor. This is in harmony with the authorities in general. This court considers itself committed to this rule.

The evidence is not such as to require the court to find as a matter of law that there was such an agreement. The rule that oral evidence is inadmissible to vary the terms of written instruments is generally applied only in suits between parties to the instrument. "It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others." 1 Greenleaf, Evidence (16th ed.) sec. 279. It will be seen that there is no such express provision in the receipt and contract of settlement. When these papers were presented to the plaintiff for her signature, the question was asked: "Does this release only the Burlington?" And it was answered by both the plaintiff's counsel and Mr. Thomas, who represented the railroad company, that it only released that company, and the papers were thereupon executed by this plaintiff. We do not think the court should so construe the transaction as matter of law. Under the circumstances disclosed in this record, the question was for the jury. The plaintiff can have but one satisfaction for the injury. She can only recover from this defendant, in any event, the amount of damages occasioned by the injury, less such payment as she has received thereon.

In this discussion we have also assumed that the defendant was negligent, and that its negligence was a proximate cause of the injury complained of, but this has been assumed only for the purpose of discussion. The evidence is conflicting as to the negligence of this defendant, and

In re Estate of Holloway.

whether such negligence, if any, was the proximate cause of the injury. This question, also, should be submitted to the jury for its determination.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., concurs in this conclusion.

IN RE ESTATE OF ACHSAH HOLLOWAY.

**COE C. HOLLOWAY, APPELLEE, v. J. ARTHUR TILLSON,
ADMINISTRATOR, APPELLANT.**

FILED MAY 23, 1911. No. 16,438.

- 1. Executors and Administrators: CLAIMS: REFERENCE: STIPULATIONS: WAIVER.** Upon appeal to the district court from an adjustment by the county court of a controversy in settling an estate involving many items of claim and counterclaim, the district court ordered formal pleadings filed. The parties stipulated that copies of the itemized statements filed by the respective parties in county court might be filed in lieu of such pleadings. The referee appointed by the district court found generally upon each item, stating the balance. The district court, upon motion, refused to set aside the report of the referee, and refused to recommit the case for special findings of the facts supporting specified items of the report. *Held*, That the parties had waived the right to object to the report on the ground that these findings of fact were insufficient and are not entitled to a reversal because of these rulings.
- 2. Appeal: FINDINGS OF REFEREE: PRESUMPTIONS.** The rule that a court will not be presumed to have based its decision upon incompetent evidence when the record shows sufficient competent evidence to support it applies also to the findings of a referee in stating an account.
- 3. Witnesses: COMPETENCY: TRANSACTIONS WITH DECEDENT.** When the representative of a deceased person is a party to an action, one having a direct legal interest in the controversy will not be allowed to testify to transactions with the deceased. This would

In re Estate of Holloway.

apply to identification of checks drawn by the witness and delivered to the deceased. If the witness is allowed to identify the checks without objection, and is fully cross-examined thereon, an objection to the introduction of the checks in evidence is properly overruled.

4. **Appeal: Review.** Many questions asked of witnesses by appellant upon cross-examination were upon objection disallowed by the court. Also appellant specified in the brief many items of account that he claims are not supported by the evidence. Upon examination of the record, the evidence is found to be sufficient, and no prejudicial error is found in the rulings of the court thereon.
5. **Limitation of Actions: Accounts.** Where there is a running account between the parties consisting of unsettled items of debit and credit and the dealing between the parties was continuous, and not interrupted for a sufficient length of time for the running of the statute, such items of account are not barred by the statute of limitations.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

J. Arthur Tillson and Fred A. Nye, for appellant.

H. M. Sinclair and W. D. Oldham, contra.

SEDGWICK, J.

Coe C. Holloway, the claimant, filed his claim in the county court of Buffalo county against the estate of his mother, Achsah Holloway. The claim, as filed, consists of a large number of items and amounted to something over \$14,000. The administrator of the estate filed objections to the claim and alleged a large number of items against the claimant and in favor of the estate. Commissioners were appointed by the county court, who investigated the respective claims and found that there was due the administrator from the claimant \$9,224.53. From this finding and the order of the county court thereon, the claimant appealed to the district court. The district court referred the matter to the Honorable H. J. Whitmore to report findings of fact and conclusions of law.

The referee reported that there was due to the estate from the claimant \$3,228.83 and interest at 7 per cent. from the 18th day of January, 1909, to the 1st day of May of that year, which was the date of the report. From the judgment upon this report the administrator has appealed to this court.

1. When the report of the referee was filed in the district court, the administrator filed a motion for further findings of fact by the referee, which was overruled, and this ruling is now assigned as error. By stipulation between the parties the dispute was confined to 13 items of credit claimed by Mr. Holloway. One of these items, as stated by the claimant, was "Dec. 22, 1888, \$1,385.69, notes of Ira and Achsah Holloway." Ira Holloway, the father of the claimant, died some time before the death of the claimant's mother. The object of the motion for further findings of fact was to require the referee to find the facts in regard to this and other items. When the court ordered that the claimant file a petition and the administrator an answer, the claimant filed as his petition a mere duplicate of the statement of the items of debit and credit filed by him in the county court. The administrator thereupon filed as his answer a duplicate of his statement of items as filed in the county court. It was stipulated by the parties that the cause should be tried upon these informal statements, thus waiving a compliance on the part of the complainant with the order of the district court to file a formal petition. So far as we have observed, both parties proceeded in the trial as though formal pleadings had been filed. There is no doubt that the order of the district court requiring the claimant to file the petition was a proper and necessary order in this case. The facts should have been as fully pleaded as is required in an ordinary action on such an account. After the court had directed that formal issue be made up, the administrator waived this and consented to proceed to trial upon these informal statements of account. In his answer he added some allegations in regard to these items by way

of defense, and, if the referee had found for the administrator in regard to these items, he would have undoubtedly found whether the allegations of the answer in regard thereto were sustained by the evidence. When he found in favor of the claimant as to these items, his findings were as definite as the allegations upon which they were based. Without doubt, if the order of the court had been complied with, the administrator would have been in a better position to resist these claims, but, after the parties have elected to try the issues as they were presented, they ought not now to be allowed to complain of uncertainties which result from the pleadings to which they consented. What we have said in regard to this item applies also to the other items similarly tried.

2. The second contention of the administrator is that "the conclusions of law in the referee's report are contrary to law because not supported by the findings of fact found in said report." The brief quotes from the opinion of Judge Cooley in *Weirich v. Cook*, 39 Mich. 134, in which it is said: "His conclusions should have been based upon such a statement of facts as would have enabled us to see that they were legitimate; such a statement as would show why the defendant should be charged with the sum for which he advises judgment." This objection is substantially answered in what we have already said.

Ira Holloway, the claimant's father, owned a large part of the stock of the bank in Gibbon, of which the claimant was cashier and apparently the principal manager. Some of the items that the accounts presented related to business transactions of Ira Holloway. By his will he gave this bank stock and his interest in these accounts to his wife, Achsah Holloway, and the business of the bank and the management of this property by this claimant continued as it was before, without any change, except the substitution of the name of Achsah Holloway in the place of Ira Holloway upon the books. This continued for nearly 20 years after the death of Ira Holloway and until the death of Achsah Holloway. After this ad-

administrator was appointed he took charge of the interest of Achsah Holloway and to some extent participated in the management of the business. He now seriously contends that the report of the referee should have been set aside because it contains no special findings in regard to the transfer of the interest of Ira Holloway to Achsah

in this the report follows the statement of and by the consent of the parties was treated and for the reasons already stated we think administrator is not now entitled to have the and another trial ordered.

objection of the administrator relates to already referred to, which is: "Dec. 22, 1888, of Ira and Achsah Holloway."

ah Holloway were residents of the state of estate of Achsah Holloway was probated

A paper was offered in evidence which a copy from the records of the court in which the probate proceedings were had. ted to as incompetent, and that no suffi- n was laid for receiving it in evidence. It

not properly certified, and it seems that as well taken, but this appears to be im- trial being before a referee, he will not have based his decision upon incompetent e was other evidence, including the testi- the employees of the bank, which, being was sufficient to support the finding of the d to this item.

checks drawn by the claimant in favor of ay were received in evidence over the ob- administrator, and it is now objected that ompetent because they were identified vidence of the claimant himself, and it is e was incompetent, under section 329 of claimant was allowed to testify fully on to the making and delivery of the en the checks were offered in evidence, other objections, it is noted that the

witness was incompetent to identify the checks. We think, however, this objection came too late. After having received his evidence without a suggestion to the referee that he was disqualified, and without any attempt to strike his evidence from the record, the ground urged was not sufficient to require the referee to reject the checks.

5. The administrator complains that he was not permitted to cross-examine the claimant as to his salary as cashier in the Commercial Bank of Gibbon. There are several pages of questions in regard to this matter recited in the brief, but it does not clearly appear how answers to these questions would have assisted the referee in determining the matter before him.

Many pages of the brief are devoted to the discussion of the insufficiency of the evidence to prove certain other credits allowed the claimant. The bill of exceptions and record are very voluminous. We cannot enter into a detailed discussion of this evidence, nor of the arguments predicated thereon. It is sufficient to say that we do not find such a failure of evidence as to these items as to require us to reverse the findings of the referee and the judgment of the district court.

The administrator urges that some of these disputed items were barred by the statute of limitations. Where there are unsettled items of debit and credit in an account between parties, each succeeding item is applied upon the true balance. If the dealings between the parties are suspended for a sufficient length of time, the statute of limitations will run, but, if the transactions are continuous, the statute will not apply. The method of computing interest was favorable to the claimant, but this was in accordance with the stipulation of the parties.

The whole record is unnecessarily complicated and unsatisfactory; the pleadings are indefinite, and much of the evidence is irrelevant. We have not found any substantial error requiring a reversal of the judgment, and it is therefore

AFFIRMED.

M. D. TYLER, APPELLEE, v. MARY J. WINDER, APPELLANT.

FILED MAY 23, 1911. No. 16,447.

Husband and Wife: CONTRACTS OF MARRIED WOMEN: EMPLOYMENT OF ATTORNEY. A married woman who has no separate estate may employ an attorney to begin and prosecute or defend an action for divorce, and make a valid contract to compensate the attorney for his service in such action.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. Affirmed.

John W. Cooper, for appellant.

Mapes & Hazen and Allen & Dowling, contra.

SEDGWICK, J.

The defendant employed the plaintiff as an attorney at law to defend her in an action for divorce brought against her by her husband. The plaintiff brought this action to recover the value of his services rendered in that employment. The cause was tried in the district court for Madison county without a jury, and a judgment entered for the plaintiff. The defendant has appealed.

A motion was made in this court to dismiss the appeal, but, as we are satisfied that the judgment is right upon the merits, we prefer to place our decision upon that ground. It appears that when the divorce proceedings were begun this defendant had no property or estate in her own right. The defense is coverture. It is insisted that as the defendant had no property at the time of the employment she could not have incurred liability with reference to her separate property, trade and business, or upon the faith and credit thereof. The construction of the married woman's act of 1871 and amendments thereto has several times been before this court, but the precise question here involved has not perhaps been before considered. In the early case of *Webb v. Hoselton*, 4 Neb.

308, which was decided in 1876, it was determined that a note given by a married woman and secured by a mortgage on her separate estate was a valid obligation, and that case is followed in *Davis v. First Nat. Bank*, 5 Neb. 242, and *Gregory v. Hartley*, 6 Neb. 356, and many later cases. In *Grand Island Banking Co. v. Wright*, 53 Neb. 574, and *Kocher v. Cornell*, 59 Neb. 315, it was held that, when a married woman signs a note as surety, it must be made to appear that she did so intending to charge her separate estate. In the latter case the fifth and sixth paragraphs of the syllabus are: "The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract. A mere hope of succession to an estate is not property." In considering the enforcement of a general contract of surety, and in determining whether in making such a contract the intention was to bind the separate property of a married woman, these paragraphs of the syllabus may be considered appropriate. *Farmers Bank v. Boyd*, 67 Neb. 497; *Northwall Co. v. Osgood*, 80 Neb. 764, and cases there cited are decided upon similar principles. In *Northwall Co. v. Osgood*, *supra*, the defendant, a married woman, was sued upon a note which she signed at the request of her husband, and which was given in payment for a gasoline engine purchased by her husband, in which she had no interest. This court has frequently decided that in such cases, and in all cases where a married woman has signed as surety or in any way for the benefit of another, and not in her own business or for her own purposes, there is no presumption that she agreed thereby to bind her separate estate or property. In *Kocher v. Cornell*, *supra*, it is held that when a married woman signs a note as surety, and has no separate estate or property at the time of signing it will be presumed that she did not contract with reference to her property or business.

If she has rights to protect or enforce, and makes contracts reasonably appropriate to enforce or protect them, the case is entirely different. The cases cited do not de-

termine that choses in action are not property, nor that actions brought to establish rights in property should not bear their own expenses. We are not aware that this court has ever decided that a married woman may not employ an attorney to establish for her a right in property, and create a personal liability in so doing. Such questions are interesting, since the advance of civilization and changed conditions of society have produced so much legislation enlarging the rights and responsibilities of married women. This case, however, largely depends upon the provisions of the statute providing for the action in which the service was rendered. Section 12, ch. 25, Comp. St. 1909, is as follows: "In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, and award execution for the same; or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver." This is an exact duplicate of a section of the Michigan statutes. The statute has been construed by the court of that state in *Wolcott v. Patterson*, 100 Mich. 227, and other cases. The Michigan case cited was unlike the case at bar in one respect. The wife had a separate estate and paid the attorney, but the reasoning of the court in the case we are considering. The court said that the right to contract for such services is inherent to and included in her right to bring an action. We expressed a similar thought: "You cannot do take the means whereby I live." This gives her the right to bring an action for divorce in her own name, and provides that the costs may be assessed against her. The court may under certain circumstances require the husband to pay all costs, including the attorney's fees for both parties. If, however, the husband is unable to pay, and the wife has no property, the court may require the husband to pay for her, unless she is allowed the "means

Tyler v. Winder.

whereby" she can maintain her suit. If she may bring an action to be released from a worthless husband, who has given her just cause, and she has the ability and energy to acquire means, why should she not be allowed to make such necessary contracts as she is confident she will be able to redeem? If the husband has property, and she is entitled to divorce and a share of that property, why should she not contract with reference to that property right? We agree with the Michigan court that "the right to contract for such services is necessarily incident to and included in her right to bring suit." There are many decisions which seem to hold a contrary doctrine. Among them are *Cook v. Walton*, 38 Ind. 228; *Wilson v. Burr*, 25 Wend. (N. Y.) 386; *McCabe v. Britton*, 79 Ind. 225; *Drais v. Hogan*, 50 Cal. 121; *Whipple v. Giles*, 55 N. H. 139, cited by defendant. Some of the authorities so holding are quite ancient and seem to be under the influence of the old common law rule. Some are under statutes quite different from ours. In others which seem to be more nearly in point the reasoning is not as satisfactory as in the Michigan cases. They do not appear to us to be in harmony with the policy of our state as shown in its legislation.

We think the judgment of the district court is right, and it is

AFFIRMED.

FAWCETT, J., dissenting.

I do not think the clause in the section of statute quoted in the majority opinion, viz., "and it may decree costs against either party, and award execution for the same," should be construed as enlarging the power of a married woman to contract for the payment of an attorney's fee in a divorce suit, so as to make her personally liable upon such contract. If at the time of instituting the suit she owned a separate estate, I concede that she might make a contract specifically charging such estate, but I do not think she is competent to then, while still under the disabilities of coverture, and not possessed of any separate

estate, make a contract which would bind her personally and render after-acquired estate liable for the satisfaction of such contract; and that this would be true whether such acquired estate be by inheritance (*Kocher v. Cornell*, 59 Neb. 315) or from an allowance by the court of alimony in a divorce suit. At the time of employing counsel to defend such suit, she would still be under the disabilities of coverture, without separate estate of her own and the estate from which the alimony is to be paid vested in her husband. Moreover, section 12, ch. 25, Comp. St. 1909, quoted in the majority opinion, recognizes the liability of the husband for the expenses of the wife in either prosecuting or defending a divorce suit. I think this statute not only recognizes the duty on the part of the husband to pay these expenses incurred by the wife, but also recognizes the further fact that the estate which is then vested in the husband is one in which the wife has a certain though inchoate interest, and that it would be unjust to deprive her of a sufficient amount of such community property to enable her to litigate with him the question as to whether or not he has violated the marriage contract. While I concede that the authorities are conflicting upon this point, I think the reasoning of *Cook v. Walton*, 38 Ind. 228, and the other cases in harmony therewith, cited in the majority opinion, state the better rule and should be followed.

The limitations upon the powers of a married woman to contract are founded upon reason and a sound public policy; and I cannot conceive of any case where her rights should be more jealously safeguarded than in a divorce suit. In such a case she has (or thinks she has) been grievously wronged by her husband. She is without means to employ counsel to assist her in obtaining her rights. Her husband has the title to and possession of all of their community estate. She appeals to a lawyer for assistance. He is familiar with the statutes and knows that he can protect himself by obtaining an order from the court requiring the husband to pay him a reasonable

Tyler v. Winder.

attorney's fee in such divorce suit, and I do not think he should be permitted to refrain from thus protecting himself and then seek to recover from the wife a portion of the moiety awarded to her by the court as alimony. I think this never should be permitted, unless it clearly appears in the decree of the court that the alimony awarded to the wife is intended to include the services of her attorney. The clause in the majority opinion, "If, however, the husband is worthless, and the wife has no property, the action is denied her, unless she is allowed the 'means whereby' she can maintain her suit," does not appeal to me for the reason that, to the honor of our profession be it said, there is probably not a gentleman in the profession who would not come to the relief of such a woman in her extremity.

It is a well-known fact that in the larger cities the procuring of divorces is an "industry" on the part of a certain class of lawyers. The majority opinion would leave the women who had been caught in their nets at the mercy of these divorce sharks, as they would invariably demand from their clients a portion of the pittance awarded as alimony, as an attorney's fee, in addition to what may have been previously allowed by the court "as costs." It is true that in such a case, if the victim should apply to the court in which the case had been heard, it would promptly make the attorney disgorge the excess; but very few of such unfortunate women would know that any such avenue of escape from the extortion of their attorneys was open to them.

REESE, C. J., concurs in dissent.

BY, APPELLEE, V. CHARLES E. LAVERICK ET
AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,469.

JUDGMENT: EVIDENCE: SUFFICIENCY. The question pre-
sented is solely one of fact, and the evidence is
sufficient to support the decree.

the district court for Furnas county:
JUDGE. *Affirmed.*

For Rain, for appellants.

For Butler, contra.

On July 27, 1907, this plaintiff, Elizabeth Bosley, con-
victed, Charles E. Laverick, by quitclaim
for nominal consideration of one dollar, a quarter
section in Furnas county. Mr. Laverick was act-
ing as an intermediary, and as a part of the same trans-
action with his wife, conveyed the same land
to Elizabeth Bosley, the plaintiff's husband. This con-
veyance was by a quitclaim deed and for the nominal
consideration of one dollar. After the death of Emanuel
Bosley, the plaintiff began this action against his heirs
and Charles E. Laverick in the district court for Furnas
county to set aside said conveyances. The district court
found generally in her favor and entered a judgment can-
celing the deeds. Some of the defendants made default;
others have contested the suit, and have appealed to this
court. The defendants in their brief say that two ques-
tions are presented: "First. Did the appellee on the 2d
day of August, 1907, freely and voluntarily join in the
execution of the deed whereby the premises in controversy
were conveyed through a trustee to her husband? Second.
Was the appellee through 'deceit, fraud, and misrepresen-
tation induced to execute the deed and to believe that her

Bosley v. Laverick.

husband would be entitled to a life interest in the lands therein described, and no more, and that upon his death said lands would revert in fee to the heirs at law of the plaintiff?" "

The petition alleges that the plaintiff was married to Mr. Bosley in January, 1898; that she then had four children by a former husband, and that she had dower and homestead rights in a valuable farm of 160 acres in Furnas county and was the owner of personal property of the value of \$2,100; that the farm in suit was purchased wholly with her money, the proceeds of her property; that Mr. Bosley at the time of their marriage had no property whatever; that, when the said deeds of the property in question were made, the plaintiff was old, infirm and ill, believed that she was in her last illness, and "wholly ignorant of business methods," and "by reason of said sickness * * * wholly incapacitated from properly attending to matters of business"; that she desired, in case of her death, that her husband should "have the use and control of the aforesaid described land after the death of the plaintiff during the lifetime of the said Emanuel Bosley, and no longer"; and that Mr. Bosley, knowing this, and taking advantage of her sickness and ignorance, procured her to execute the aforesaid deed, which was an absolute conveyance on its face. The petition is quite lengthy and contains other similar allegations that it is not necessary now to recite. The answer admits the marriage and the conveyance and other formal matters, and denies generally the other allegations of the petition. There is no allegation in the answer that Mr. Bosley at any time owned any property, or that he in any way contributed to the purchase of the property in question.

That the plaintiff was ill and confined to her bed at the time of the execution of the deed in question seems to be admitted, but it is contended that the evidence does not show that any special effort was made by the parties present to persuade the plaintiff to execute the deeds instead of a life lease. The evidence shows without contradiction

Bosley v. Laverick.

that the plaintiff at the time of her marriage was possessed of the property substantially as alleged, and that the land in question was purchased from the proceeds of this property. There is no attempt to allege or prove that Mr. Bosley furnished any of the money with which to buy this land. There was no motion for a new trial in the district court. We cannot, therefore consider errors of law occurring at the trial. There was some incompetent evidence received. The plaintiff being the real party in interest and the adverse parties being the representatives of the deceased person, she was not qualified to testify to the transaction between herself and the deceased. If the objection to her testimony should not be considered now as waived, and her testimony upon those particular transactions is rejected, there is still ample evidence to show that the land in question was hers at the time of the execution of these deeds, and that she was not in a condition to realize that she was giving an absolute conveyance instead of a life lease of the land, and that Mr. Bosley and those who acted for him took advantage of this situation and so procured the conveyance which was wholly involuntary on her part. The allegations of the petition and the proof agree in this matter, and there is no ground for the criticism in that regard.

The decree of the district court is right, and is

AFFIRMED.

FAWCETT, J., not sitting.

LERTON and ROOT, JJ., concur in conclusion.

JAMES H. HART ET AL., APPELLEES, v. VILLAGE OF AINSWORTH, APPELLANT.

FILED MAY 23, 1911. No. 16,473.

Municipal Corporations: PLATTED LAND: VACATION OF PLAT: STREETS: REVERSION. When the recorded plat of an addition to a village, or some definite part thereof, has been duly vacated by a written instrument declaring the same to be vacated, duly executed, and recorded as the statute provides, and none of the streets laid out or described in such plat is a public highway laid out according to law, and no rights or privileges of other proprietors in said plat are abridged or destroyed, such vacation of the plat divests all public rights in the streets shown therein, and such vacated streets are the property of the proprietors of the adjoining lots.

APPEAL from the district court for Brown county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

William M. Ely, for appellant.

A. W. Scattergood, contra.

SEDGWICK, J.

The plaintiffs brought this action in the district court for Brown county to quiet their title to certain lands in the defendant village. There was a general demurrer to the petition, which was overruled, and, the defendant refusing to plead further, a decree was entered for the plaintiffs. The defendant has appealed.

The petition alleges that in 1884 one Nannie J. Osborne, who was unmarried, "made, executed, acknowledged and recorded her certain town plat whereby she laid out and platted a portion of land (describing it) into an addition to the village of Ainsworth, to be called and known as 'Osborne's Third addition' to said village," and that these plaintiffs were the owners of all the lots in certain blocks of said plat on the 18th day of November, 1908, and on that day duly vacated the same. The petition also alleges the vacation as the statute provides may be done, and that

the plaintiffs have been in the exclusive possession of the said lands, including the streets, for more than ten years prior to the commencement of the action, and that during that time none of the streets in question have ever been traveled or worked in any manner by the village, but have been occupied by the plaintiffs for agricultural purposes, and the defendants now claim to own the said streets, and have destroyed the plaintiffs' fence around the lands described and threaten to destroy it as often as it shall be built. No question is made as to the form of the action, and there is no controversy between the parties, except as to the ownership of the streets shown upon a platted addition to a village, which plat has been duly vacated by all of the lot owners.

It is contended by the defendant that, when the plat of an addition to a village is made and recorded, the village becomes the absolute owner of the streets shown upon the plat, and, if a plat is duly vacated under the provision of the statute, the village is the owner of the streets. Section 106, art. I, ch. 14, Comp. St. 1909, provides: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes." The following sections provide for vacating plats: Section 108. "Any such plat may be vacated by the proprietors thereof at any time before the sale of any lots therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged, or proved and recorded in the same office with the plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat. And in cases where any lots have been sold, the plat may be vacated, as herein provided, by all the owners of lots in such plat joining in the execution of the writing aforesaid." Section 109.

"Any part of a plat may be vacated under the provisions and subject to the conditions of this chapter; provided, such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat; and provided, further, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law." Section 110.

"When any part of a plat shall be vacated as aforesaid, the proprietors of the lots so vacated may inclose the streets, alleys, and public grounds adjoining said lots in equal proportion." The provisions of these sections seem to be plain. When any lots have been sold, the owners of the lots, if they all join, may vacate the plat in the same way that the original proprietor might have done, and the execution and recording of the writing vacating the plat by the proprietors "shall operate to destroy the force and effect of the recording of the plat so vacated, *and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat.*" Any part of a plat may be vacated in the same way by all of the owners of the lots, and the only restriction on so doing is that such vacation will not abridge or destroy any of the rights or privileges of any other proprietors in said plat, and must not close or obstruct "any public highway laid out according to law." It is further provided that after the plat has been so vacated the proprietors of the lots "may inclose the streets, alleys, and public grounds adjoining said lots in equal proportion." These provisions of the statute are clear and certain, and provide that when the plat is properly vacated the streets and alleys belong to the lot owners, except public highways laid out according to law.

As we have already seen, the petition plainly alleges that none of these streets are public highways or have been laid out or used as such. There would therefore be no apparent difficulty in the case, if it were not for the decision of this court in *Krueger v. Jenkins*, 59 Neb. 641, which is quoted and approved in *City of Wahoo v. Netha-*

way, 73 Neb. 54, and another provision of the statute in regard to streets in cities and villages which is cited in those opinions. Section 77, art. I, ch. 14, Comp. St. 1899, provides: "The city shall have power by ordinance to sell and convey all public squares, streets, and alleys within the cities or villages," with a proviso in regard to objections that may be made by parties who are interested. This statute is referred to in *Krueger v. Jenkins*, *supra*, and it is said in the opinion: "They own in fee simple the streets, alleys, and other public places within their corporate limits. See Comp. St. 1899, ch. 14, art. I, secs. 104, 106. They may maintain ejectment to recover possession of them, they may, speaking generally, vacate them either in whole or part. The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purposes." The action was by a landowner to enjoin the county commissioners from appropriating a certain piece of land for road purposes, and the question was whether the landowner could acquire a right to the land by adverse possession and occupancy for more than ten years. It was decided that she could so acquire the right to the land, and, to distinguish that case from former decisions in which it had been held that cities and villages were "subject to the operation of the statute of limitations," the court called attention to the difference in the statutes in regard to the rights of the public in streets in cities and villages and the statutes in regard to those rights in public roads outside of cities and villages. It was not necessary in that case to determine the force and effect of the various statutes in regard to the title to streets in cities and villages. It must also be considered that the statute in the case referred to relates to streets as such; that is, as public highways in the city or village, and not to such as are only nominal streets designated in the plats but never used as public highways. The sections of the statutes quoted in this opinion are continued by the same designation in the Compiled Statutes of 1909. Cities

Heilman v. Reitz.

and villages may lay out and open new streets, and for that purpose may purchase lands. They also may vacate streets and alleys. When they have purchased lands for such purpose or streets have been duly opened and have become thoroughfares, the statute protects the title which the city or village has so acquired. The vacation of the plat shall not "authorize the closing or obstructing of any public highway laid out according to law." Questions might arise upon these statutes as to ownership of vacated streets that are not presented by this record. In this case it does not appear whether the lands platted were within, or ever became a part of, the village. It does appear that none of the streets designated upon the plat had ever been accepted by the village, or used as a street. In such case the plat may be vacated, all owners of the lots joining, and such vacation operates "to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets," and the proprietors of the lots "may inclose the streets * * * adjoining said lots in equal proportion." If there were streets in this vacated plat that had been opened as such and were in use by the general public, it might be necessary to consider the apparent conflict in these statutes and to determine the rights of the public in such thoroughfares. No such condition, however, is presented in this case.

We think, therefore, that the petition states a cause of action, and that the judgment is correct. It is therefore

AFFIRMED.

NEWTON D. HEILMAN ET AL., APPELLEES, V. SAMUEL
REITZ ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,400.

1. **Wills: CONSTRUCTION.** In construing the provisions of a will, the following rules must be adhered to: First, if the will is ambiguous, the law favors the heir in preference to one not related to the testator by blood; second, heirs will not be disinherited by

Heilman v. Reitz.

conjecture, but only by express words or necessary implication; third, actual disposition of the estate to another person is necessary to deprive the heir of the property of his ancestor.

2. ———: ———. The will of the testator gave to his widow two-fifths of the net income of his estate during her life. It directed that after her death the property of the estate be sold by trustees and the proceeds divided among his three heirs and four church corporations, each taking one-seventh. This was all that was bequeathed to them by the will. Under this bequest they were entitled to nothing more. The three-fifths of the net income of the estate was not mentioned in the will nor bequeathed to any person or corporation. *Held*, That it descended to the widow and heirs under the statute as intestate property, each taking one-fourth thereof.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed with directions.*

Field, Ricketts & Ricketts, for appellants.

Tibbets & Anderson, Clark & Allen and *George W. Berge*, contra.

REESE, C. J.

Jonathan Reitz, a resident of Lancaster county, died April 12, 1906, leaving as his widow the defendant Catherine L. Reitz, and as his children and heirs at law the defendants Samuel Reitz, David Reitz and Jonathan Reitz. He was the owner of an estate of the value of about \$20,000, which consisted of a farm of 320 acres of land, in Lancaster county, and his homestead of much less than \$2,000 in value, in the village of Waverly, in said county, and some personal property. On the 28th day of November, 1905, he executed his last will and testament, which after his decease was duly admitted to probate by the county court of Lancaster county. The will, with the exception of the formal parts, is as follows:

“First. I direct that as soon after my decease as practicable my executors shall pay off and discharge all of my indebtedness including my funeral expenses.

"Second. I give, bequeath and devise to my wife, Catherine L. Reitz, the exclusive use of the property located in Waverly, Nebraska, which is now occupied by me and my family as a homestead, during the period of her natural life.

"Third. I furthermore give and bequeath to my wife, Catherine L. Reitz, two-fifths of the entire net income of all the remainder of the real estate of which I may die seized, during the period of her natural life, the same to be paid to her by my executors and trustees as hereinafter provided.

"Fourth. After the payment of all my debts and obligations and costs and expenses of administration of my estate from the proceeds of my personal property, I give and bequeath to my said wife all of my household furniture and one-fourth of the remainder of my personal property.

"Fifth. As soon after the death of my wife Catherine L. Reitz as practicable, I direct that my executors and trustees, hereafter named, make sale of all of my property both real and personal, not heretofore disposed of, and which may be at that time remaining, and convert the same into cash, and for the purpose of accomplishing the provisions herein made, I hereby authorize and empower my said executors and trustees to give good and sufficient warranty deeds conveying the said real estate to the purchasers thereof, and to convey all and every title and interest thereto which I would have a right to convey if I were living.

"Sixth. After my said estate shall be turned into cash as above set forth, I direct that the same shall be divided into seven equal parts, and to each of the following named parties and corporations I give, devise and bequeath one of each equal parts, to wit: to my son Samuel Reitz, one part, to my son David Reitz, one part, to my son Jonathan Reitz, one part, to the Board of Church Extension of the General Synod of the Evangelical Lutheran Church of the United States, one part, to the Trustees of the Midland College at Atchison, Kansas, one part, to the Board of Home Missions

Heilman v. Reitz.

of the General Synod of the Evangelical Lutheran Church of the United States, one part, and to the Board of Foreign Missions of the Evangelical Lutheran Church of the United States, one part, and I direct that my executors and trustees pay the said bequests as above provided.

"Seventh. For the purpose of carrying on the provisions of this will I hereby name and appoint Newton D. Heilman and Samuel E. Heilman, of Lancaster county, Nebraska, as my executors and trustees, and give them full power to act in all matters necessary for the carrying out of said provisions."

The persons nominated in the will as the executors qualified and were duly appointed as such, settled up the estate, made their final report, were discharged, and entered upon their duties as trustees. In the management of the estate quite a fund has accumulated, mostly from the rentals of the farm, and which is in the hands of the trustees, with the exception of the two-fifths thereof which has been paid to the widow. The remaining three-fifths is claimed by the heirs as a portion of the estate undisposed of by the will, while the religious corporations named in the will insist that the fund, with its increase, should remain in the hands of the trustees until the decease of the widow, Catherine L. Reitz, when it, with the proceeds of the sale of the land, should be divided among the legatees named in the sixth clause of the will. If no part of the fund belongs to the legatees, other than the heirs, the heirs are entitled to it as it accumulates, and are entitled to the immediate payment of what is now in the hands of the trustees. The trustees being in doubt as to their duties, and for the purpose of their protection and of obviating the necessity for future litigation, filed their petition in the district court, making all legatees and the widow parties to the suit, and asking for a construction of the will and instructions as to their duties. All defendants answered setting up their claims, and making their demands in accordance with their contentions. The cause was tried to the district court, when a decree was entered finding generally in favor of

plaintiffs and the legatees, other than the widow and heirs, and against them. It was found that the trustees should continue to hold the net income of the estate, less the widow's two-fifths, until the death of the widow, and upon the happening of that event the fund should be divided into 7 parts and distributed according to the terms of the will. A decree was entered in accordance with the findings. Samuel Reitz, David Reitz, Jonathan Reitz, and the widow, Catherine L. Reitz, appeal.

At the time of the trial, which was in April, 1909, the widow was said to be about 65 years of age, possibly a little older. At the time of the death of her husband, the testator, her age was probably about 62 years. Assuming that she was in the enjoyment of normal health, her life expectancy was about 13 years. It would not be contrary to nature for her to exceed that time by 5 to 10 years, or even longer. Three-fifths of the annual rental is about \$900 a year. At the time of the death of the widow, assuming that she should die at the end of her expectancy of life, the fund in the hands of the trustees would be not far from \$12,000, to say nothing of its increase from investment. If loaned out each year as it accumulated, at the highest obtainable rate of interest, upon good security, it would, of course, be much more. There is no direct provision in the will disposing of this fund, nor authority to the trustees to invest it or cause it to increase by the accumulation of interest. If the contention of the church corporation legatees is the correct one, the trustees might, so far as the provisions of the will direct, hold the money in their possession until the death of the widow and the subsequent sale of the real estate and the conversion of the price into cash. There is no direct requirement that the property be sold for cash, and it would be quite reasonable that time should be given for the payment of a part of the purchase price. There is no provision in the will requiring the trustees to give bond or other security for the faithful accounting of the fund by them, nor do we find any direct provision for the possession and renting of the

real estate by the trustees, except as might be inferred from the clause requiring them to pay the two-fifths of the net income thereof to the widow, and the general clause at the closing part giving the executors and trustees "full power to act in all matters necessary for the carrying out of said provisions," which we think must mean the provisions requiring the sale of the property of the estate and the division of the funds arising therefrom.

In considering the construction of wills, there are certain fundamental rules which should be adhered to: First. If the will is ambiguous, the law favors the heir in preference to one not related to the testator by blood. *Pendleton v. Larrabee*, 62 Conn. 393; *Downing v. Bain*, 24 Ga. 372; *Miller v. Hirsch*, 110 La. 259; *Vail v. Vail*, 10 Barb. (N. Y.) 69; *Mullarky v. Sullivan*, 136 N. Y. 227; *Bane v. Wick*, 19 Ohio, 328; *Davis v. Davis*, 62 Ohio St. 411; *Malone v. Dobbins*, 23 Pa. St. 296; *Biddle's Estate*, 28 Pa. St. 59. Second. Heirs will not be disinherited by conjecture, but only by express words or necessary implication. *Wilkins v. Allen*, 18 How. (U. S.) 385; *Wright v. Hicks*, 12 Ga. 155; *Young v. Quimby*, 98 Me. 167; *Leigh v. Savidge*, 14 N. J. Eq. 124; *Bane v. Wick*, *supra*; *Crane v. Doty*, 1 Ohio St. 279; *Bender v. Dietrick*, 7 Watts & Serg. (Pa.) 284. Third. That actual disposition of the estate to another person is necessary to deprive the heir of the property of his ancestor. *Wright v. Hicks*, *supra*; *Haralson v. Redd*, 15 Ga. 148; *Bourke v. Boone*, 94 Md. 472; *Zimmerman v. Hafer*, 81 Md. 347; *Hurst v. Von De Veld*, 158 Mo. 239; *Schauber v. Jackson*, 2 Wend. (N. Y.) 13; *Hitchcock v. Hitchcock*, 35 Pa. St. 393; 30 Am. & Eng. Ency. Law (2d ed.) 668.

With these rules in mind, we proceed to consider the provisions of the will. Two-fifths of the entire net income of the real estate is bequeathed to the widow during her life. (We do not deem it necessary to notice other bequests to her.) This is the only reference to the income of the real estate, but it is apparent that the testator had that income in mind. By the fifth clause of the will the

executors are to "make sale" of all "property, both real and personal," remaining, and "convert the same into cash, and for the purpose of accomplishing the provisions" made in the will, and in order that this purpose might be carried out, he gave authority to convey the real estate. By this language it is not apparent that the testator was considering the income of the real estate as a part of that property. Indeed, it seems clear that he was not, as that fund would be already in "cash" and no conversion would be necessary. By the sixth clause it is provided that after the estate "shall be turned into cash as above set forth" (meaning as set forth in the fifth clause), "the same (that is the cash resulting from the sale of property) shall be divided into seven equal parts," and one-seventh part is to be given "to each of the following named parties and corporations." The "parties" named are the three sons, Samuel, David and Jonathan, and the corporations are the ecclesiastical corporations named. This disposes of the fund arising from the sale of the property, but nothing more. There is nothing in the will which by any possible construction or implication gives to the church corporations anything in excess of that named in the sixth paragraph, and we cannot extend its provisions. A consideration which appeals somewhat to the reason of the writer is the fact that the testator had three sons and no other lineal descendants. He gave to his wife two-fifths of the income of the real estate. This left of that fund three-fifths undisposed of. Without a knowledge of the law of descent of personal property as it existed at that time, it would seem reasonable that he may have supposed that the three sons would receive each one-fifth, which would dispose of the whole fund, and therefore did not bequeath it to the church corporations. Whether the failure to make a complete disposition of that fund was an oversight of the testator, or of the scrivener who wrote the will, it is not necessary to inquire, as it seems clear that the three-fifths were not bequeathed to any one, and hence became intestate and descended to the testator's

By the law in force at the time of the death of the the widow of a decedent took the same interest in a property as a child of the intestate. The fund consideration not having been disposed of by the d there being three children, she, with each, took th of the three-fifths of the net fund, and to which e entitled as soon as the amount is collected and es can be ascertained, but subject to the payment s on the land, making repairs thereon, and the y expense of administration.

questions, growing out of the application of the fund, as to the payment of taxes and making re- on the homestead property, are presented, but as ; fund belongs to the widow and heirs, she to have is of the whole and one-fourth of the remaining ths, it is thought no other questions need be dis- or decided. The parties have presented very able austive briefs upon the law of the construction of ting many cases, but in our view of the case it is med necessary to follow them, for the reasons tated. It is not the belief of the writer that there mbiguity in the will. The legatees not of the blood e only what is given them, either by express words ssary implication. The income of the land was not hed to them and therefore goes to the widow and ut, were we persuaded that there is any ambiguity, ld still hold that, as the law favors the heirs, they are entitled to have the fund follow the course prescribed by statute.

The decree of the district court is reversed, and the cause is remanded to that court, with directions to enter a decree commanding the trustees to pay out of that fund, first, the taxes and for repairs upon the property, from which the fund arises, necessary to maintain it in the condition in which it was at the time of the decease of the testator, together with the costs and expenses of administration; second, to pay the widow the two-fifths of the net income as directed by the will; third, to pay to the

Whiteside v. Adams Express Co.

widow and the heirs Samuel Reitz, David Reitz and Jonathan Reitz, each, one-fourth of the remaining three-fifths of the net income thereof; and that the costs of this proceeding be taxed to the Board of Church Extension of the General Synod of the Evangelical Lutheran Church of the United States, the Trustees of the Midland College at Atchison, Kansas, the Board of Home Missions of the General Synod of the Evangelical Lutheran Church of the United States, and the Board of Foreign Missions of the Evangelical Lutheran Church of the United States.

REVERSED.

**GEORGE H. WHITESIDE, APPELLANT, V. ADAMS EXPRESS
COMPANY ET AL., APPELLEES.**

FILED JUNE 13, 1911. No. 16,432.

1. **Bailment: LOSS BY BAILEE: LIABILITY.** An applicant for license to practice medicine in this state sent his diploma to the board of health with request that a license issue to him. The diploma was received by the secretaries, examined, passed upon favorably, and, as was their custom, placed in a mailing case, properly directed to the applicant, and delivered to the Adams Express Company, one of the leading and responsible express transportation companies in the state, having an office at Lincoln, the point of transmission, and at Superior, the place of delivery. The applicant had given no instructions as to the method of returning the diploma to him, nor had he furnished any postage or other funds to pay for its return. The method of transmission adopted by the secretaries for the return of the diploma to the applicant was the usual and customary method adopted by them for the return of diplomas to applicants for license. The mailing case was received by the applicant at the terminal point named in the directions indorsed thereon, but the diploma was not therein, and was lost. *Held*, That the selection of the carrier and the delivery of the diploma to it for return was not actionable negligence on the part of the secretaries rendering them personally liable in damages for the loss of the diploma.
2. **Damages: INSTRUCTIONS: HARMLESS ERROR.** In an action against an express company for damages for the loss of a medical diploma, the court properly instructed the jury, in substance, that,

if they found by a preponderance of the evidence the diploma was delivered to the express company for transmission and was not delivered to the consignee, their verdict should be for the plaintiff; but, if they did not so find, it should be for the defendants. By another instruction they were informed that, if they found in favor of the plaintiff, their verdict should be for an amount merely nominal, "five (5) cents only." The jury returned a general verdict in favor of the defendants. *Held*, That the latter instruction was erroneous, but, as the verdict was in favor of defendants, the erroneous instruction could work no prejudice to plaintiff.

3. **Evidence: ADMISSIBILITY.** In an action pending against an express company for the loss of a medical diploma delivered to it for transmission, one of the attorneys for the defendant company applied to the college which had issued the diploma for a duplicate copy to be furnished the plaintiff. The letter contained statements that the diploma had been lost in transmission, was of some value to its owner, etc. It was offered in evidence by plaintiff as an admission of the defendant company. *Held*, That it was properly excluded.
4. **Witnesses: IMPEACHMENT: COLLATERAL ISSUE.** The deposition of a witness offered to disprove a voluntary immaterial collateral statement of another witness in his deposition was properly excluded.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

John O. Yeiser, for appellant.

Halleck F. Rose and Greene, Breckenridge & Matters,
contra.

REESE, C. J.

This action was instituted by plaintiff against the defendant, the Adams Express Company and the secretaries of the state board of health for damages alleged to have been sustained by plaintiff by reason of the loss of his medical diploma issued to him by Harvard college in the year 1882. Separate answers were filed by the secretaries and the express company. The secretaries, by their answer, admit plaintiff's graduation from Harvard college,

and that he received his diploma as alleged in his petition. The express company admits that plaintiff is a physician duly admitted to practice in this state, but denies all other allegations, except as to its own organization and existence. It is not deemed necessary to notice the pleadings further at this time. A jury trial was had, in which it was shown that plaintiff had such a diploma; that he made application to the secretaries for a license to practice medicine, and, as required by their rules, he sent his diploma to them; that they passed favorably upon his application, and, as they represent and allege, they delivered the diploma, inclosed in a case, to the express company, properly directed, for return to plaintiff at Superior, Nebraska. It was shown that the case was received by him at the office of destination; but, upon opening the same it was empty, and, if the diploma had been placed therein and delivered to the express company by the secretaries, it had been lost in transportation. It was never afterwards found, although extensive search was made by the express company and, to some extent, by the secretaries. If the testimony of plaintiff and the statement of the express agent at Superior, that the diploma alleged to have been lost was not in the roll or mailing case when delivered to plaintiff by the defendant company, are true, there must have been inexcusable negligence somewhere, either on the part of the company, or the members of the board of health, who assert that the diploma was inclosed within the mailing case at the time the same was delivered to the express company. Each defendant, the express company on one hand, and the board of secretaries on the other, sought to exonerate itself, though apparently working harmoniously, with the desire of placing the blame upon the other.

At the close of the testimony, the court, on motion of defendant secretaries, instructed the jury to return a verdict in their favor, which was done, to which plaintiff excepted, and which is now assigned for error. We are not prepared to say that this instruction should not have been

given. Whatever the facts may have been, the evidence does not show sufficient want of care to render them personally liable. In fact no want of care is shown. It is true that they had no instruction from plaintiff to return the diploma to him by express, but he had furnished no postage for its return by mail, and it was the precautionary custom of the board to return diplomas as soon as examined in order to avoid their accumulation in the office and the danger of loss. The express company was one of the leading responsible common carriers of the state, with offices in Lincoln and Superior, and it was not of itself negligence to entrust the paper to that company for transportation. They (the secretaries) received no fee or other compensation for the custody or transmission of the diploma. The manner of redelivery was not specified, no direction having been given upon that subject, and a compliance with the usages and customs of business at the place where the bailment was made and terminated would seem to be all that was required of them. 5 Cyc. 201.

As would naturally be expected, the defendant company denied having received the diploma, and sought to maintain this defense. Plaintiff sought to show that the diploma was property of intrinsic value, and that the loss thereof was a real damage to him, while the defendant company sought to minimize that value. It appeared that a certificate had been made by the college certifying that, on the date shown in the records corresponding with the date of the issuance of the diploma, such diploma, showing the graduation of plaintiff, had been issued. Aside from the instruction directing the jury to return a verdict in favor of the secretaries, the court gave the following instructions to the jury:

No. 2. "You are instructed that if you find by a preponderance of all the evidence that the diploma in controversy was contained in the package which was delivered to the defendant, the Adams Express Company, on August 6, 1903, at the time of such delivery, then your verdict should be for the plaintiff and against the Adams

Express Company. If you do not so find, then your verdict should be for the defendants."

No. 3. "You are instructed that if you find for the plaintiff you may assess his recovery, under the pleadings and proof in this case, at an amount merely nominal, and that your verdict should be for five (5) cents only."

The verdict of the jury was a general finding for the defendants.

The last of the above instructions is sharply criticised, and we think with reason. There was some evidence showing that such a document in the possession of one who had earned it does have an actual intrinsic value. This would seem to be especially true since it is made clearly to appear that it is an inflexible rule of the college never to issue a duplicate under any condition. But we do not see that this instruction is before us for examination, for the reason that under the first of said instructions the jury found in favor of the defendants, which was, in effect, that the diploma was not lost by the express company, and therefore the question of its value and the amount of damages becomes an immaterial one.

The bill of exceptions is quite a volume and abounds in objections to offered evidence, rulings thereon, and exceptions to such rulings. The assignments of error filed in this court are that (1) the judgment is contrary to law; (2) it is contrary to the evidence; (3) is not sustained by the evidence; (4) the court erred in overruling the motion for a new trial; (5) error in instructing the jury to return a verdict for nominal damages; (6) in dismissing the case of each defendant; (7) "the court erred in each instance it sustained objections to evidence offered by defendant." The seventh assignment is too vague and indefinite to merit any attention here. Such has been the law of this state during its whole history. 1 Neb. Syn. Digest, p. 180 *et seq.* In the brief of plaintiff a page is headed "Assignment of Errors," in which the first, second, third, sixth and seventh of the assignments filed with the record are omitted, and the following added: (1) The

court erred in rejecting a letter by one of defendant's attorneys to the Harvard officers "in which was made certain admissions;" (2) in excluding evidence of one J. G. Green with reference to the use of diplomas for display and advertisement; (3 and 4) verdict not sustained by evidence and contrary to law; (5) in excluding testimony showing difficulty of compelling issuance of duplicate diploma. The giving of instructions to the jury is also assigned for error, but this doubtless refers to the same as the sixth assignment filed.

The letter referred to in the first above was written to the college by one of the attorneys for the express company seeking the issuance of a duplicate diploma. It was written after the suit was commenced, in which it is said the plaintiff had sued the company for \$20,000, copying some of the averments of the petition, and stating that the diploma had been delivered to the company, and that plaintiff "claims he has never received it," that the attorney understood how such a diploma might be an asset to a practicing physician, that the company is asking for a duplicate, that it had a moral right to do so, etc. This letter was introduced as an admission of the fact of the delivery of the diploma to defendant for its transmission to plaintiff, its loss, and that it was of value. It was not written for the purpose of use on the trial, nor in any way giving direction to the procedure or influencing the action of plaintiff, nor was there any statement that the attorney had knowledge of the truth of what plaintiff claimed, nor was it made for the purpose of dispensing with formal proof of the facts claimed by plaintiff to exist. In 1 Greenleaf, Evidence (16th ed.) sec. 186, it is said that admissions made by an attorney must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. Other admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evi-

dence against his client. See, also, *Treadway v. S. C. & St. P. R. Co.*, 40 Ia. 526; Weeks, *Attorneys at Law* (2d ed.) sec. 223. It is difficult to conceive, on principle, any distinction between casual statements made to a third party orally, and such as are contained in a letter like the one presented, where the statement is incidentally made for the purpose of accomplishing a legitimate purpose, not a part of the real litigation. The letter was properly excluded.

As to the second ground, the deposition of one Dr. Charles M. Green, in charge of the college of medicine at Harvard, was taken, and the question of the value of a diploma was presented to him when he was asked, in substance, if a diploma was of any value to a physician? In the course of his answer of some length he stated that some liked to display their diplomas in their offices, when he volunteered the remark (possibly to show his wisdom): "In the west they do; but in this part of the world a man of any prominence would be ashamed to display his diploma in his office; would consider it a piece of poor taste." This would no doubt have been stricken out as an immaterial, voluntary statement displaying "poor taste;" but, instead of adopting that course, plaintiff took the deposition of Dr. Joseph G. Green, of Marblehead, Massachusetts, a city of near 40,000 population, for the purpose of disproving the statement of the other Green that such was not the practice in that part of the world. The witness interviewed a great number of physicians in Marblehead, and found that many of them *did* display their diplomas, giving the names and street number of those who exhibited the "poor taste" from the ill effects of which the other Green had exonerated them. This was a collateral question of no moment, and the court did right in refusing to admit the deposition in evidence. Had plaintiff objected to the "poor taste" part of the deposition of the other Green, his objection doubtless would have been sustained.

While to the mind of the writer the result of the trial was probably a miscarriage of justice, yet, no sufficient

Bill v. Swift

been laid for a reversal of the judgment, which is done.

AFFIRMED.

**T AL., APPELLANTS, V. LYDIA WILLEY
TST ET AL., APPELLEES.**

DO JUNE 13, 1911. No. 16,437.

REMARKS: CERTIFICATION. "The rule is settled that its own motion, refuse to consider a document record and purporting to be a bill of exceptions filed as such by the certificate of the clerk " *State Bank v. Bradstreet*, ante, p. 186.

the district court for Cheyenne county:
BY JUDGE. *Affirmed.*

h, for appellants.

m, contra.

I from a decree of the district court for

The cause is said to have been tried statement of facts. By the recitals in case was tried on the first day of May, 7 the decree was rendered. Forty days to prepare and serve a bill of exceptions day of June, 1909, an additional 40 days judge. What is said to be the stipulation upon two sheets of paper. On another date of the reporter, the proof of service motions, and the allowance thereof signed one of these papers have been filed in the of the district court, nor is there any clerk that the papers are the bill, either

Muller v. Stoecker Cigar Co.

the original or a copy thereof, as required by statute. This being true, we are left without any evidence that the bill presented contains the evidence upon which the case was tried and decided. *State Bank v. Bradstreet, ante*, p. 186.

We have examined the pleadings in the case, and find the averments sufficient to sustain the decree, and must presume that the findings of the court are supported by the evidence.

The decree of the district court is therefore

AFFIRMED.

CHARLES MULLER, APPELLEE, v. WM. F. STOECKER CIGAR
COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,446.

1. **Gaming: GAMBLING DEVICES: SLOT MACHINES.** A slot machine so operated that the operator placing a coin therein and taking a chance on what will be the result of the deposit of the coin, whether to win or to lose, is a gambling device.
2. ———: **ILLEGAL BUSINESS: SLOT MACHINES.** A cigar store where such machines are set up for the use of customers and are used by them to the advantage of the proprietor of the store, either by the winnings or the stimulation of the trade by the chance of winning by the customer, is an illegal business.
3. **Contracts: LEGALITY: RESCISSION: RECOVERY.** A contract for the purchase of a store and business where a part of the goods and fixtures purchased consist of a number of slot machines kept in use in the store for the purpose of gambling and thereby stimulating and increasing the business is an illegal contract, and so long as the same remains executory may be repudiated and rescinded, and money paid thereon may be recovered back by the person paying the same.
4. **Estoppel** to be available as a defense to an action must be pleaded.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

James W. Hamilton, for appellant.

A. S. Ritchie and Charles L. Fritscher, contra.

REESE, C. J.

This is an appeal from a judgment of the district court for Douglas county. The facts as shown by the bill of exceptions are substantially as follows: Plaintiff is a young man, a former resident of the city of Omaha, and at the time of entering into the contract, hereinafter described, was about 24 years of age. On the 20th day of November, 1905, the defendant, the Wm. F. Stoecker Cigar Company, was engaged in the business of wholesale and retail dealers in cigars, tobacco and smokers' articles, conducting one wholesale and retail business and two other retail stands in the city of Omaha, when plaintiff purchased a half interest in the business, paying in advance the sum of \$500 in cash, when the parties entered into the following written agreement: "Omaha, Neb., November 20, 1905. Received by Wm. F. Stoecker as president of the Wm. F. Stoecker Cigar Company from Chas. Muller five hundred dollars (\$500) earnest money to apply on purchase price of a one-half ($\frac{1}{2}$) interest in our wholesale and retail cigar, tobacco and smokers' articles business. It is understood that the stock and fixtures shall be figured at cost prices. Inventory to be taken not later than December 1st, 1905, and the above deal completed not later than December 5th, 1905, otherwise the above mentioned earnest money of five hundred dollars (\$500) shall be forfeited. It is herewith mutually agreed that each of us will devote our full time to the business. If one of the parties hereto wishes to withdraw or sell part of his holdings after the first of January, 1907, the other party shall have the first right to buy such shares or holdings. Wm. F. Stoecker Cigar Co., W. F. Stoecker, Prest. Chas. Muller." The invoice was entered upon and continued until completed some days later. In making

the invoice a large number of devices known as slot machines were inventoried as a part of the stock. The number of those machines in the stores and in use is not clearly shown, but there were probably about 20 of them. No objection was made to them, and they were accepted by plaintiff as a part of the stock of merchandise purchased by him. The payment of the remainder of the purchase price was, by mutual consent, deferred for some days, owing to the absence from the city of plaintiff's father, whom plaintiff desired to consult, preferring that the purchase should receive the approval of his paternal ancestor before final payment. Upon the return of plaintiff's father, who disapproved of the purchase, plaintiff refused to complete the transaction, assigning as his reason therefor that his father had other plans for him. He demanded the return of the \$500 paid. Defendant refused to comply with the demand and insisted that plaintiff comply with his contract.

Without entering upon a description of the slot machines in use in the business, we think it must be, and is, conceded that they were all gambling devices, used probably not so much as yielding a revenue to the stores in the way of winnings, but for the purpose of stimulating trade, the purchasers preferring to take a chance of heavier winnings rather than to buy goods directly at the regular and established prices. While, in the long run, the business may not have been so much the gainer from the winnings proper, yet by allowing others to play the hazard the sales were very much increased. That they were gambling devices is clear enough. It is also apparent that plaintiff offered no objection to them, and was in no way conscience smitten, either at the time of the purchase, or thereafter, until he learned by consultation with others that he might avoid his contract and recover back the money paid upon the theory that the purchase of the slot machines was against good morals and public policy, and which his then enlightened conscience could not withstand. He sued defendant for the return of the money

paid, instituting his suit in the county court as "for money had and received." Such proceedings were had as resulted in an appeal to the district court, where an amended petition was filed and in which is set out the whole transaction of the purchase of the half interest in the business, the presence and use of slot machines as gambling devices as a part of the purchase, the alleged illegality of the contract, that the business of defendant was illegal and unlawful, and that plaintiff was entitled to the repayment of the \$500, for which he asked judgment.

The answer of defendant sets up the contract of purchase, the payment of the \$500, the completion of the invoice, the promise by plaintiff to complete the transaction by the payment of the remainder of the purchase price by a date named, his failure to make the final payment, and that during the whole time of the negotiations, the invoice, and the payment of the \$500, plaintiff well knew and understood the character of all the stock and fixtures, and the same was satisfactory to him. The reply is a general denial. A jury trial was had, and upon the completion of the evidence the court, on motion of plaintiff, gave the jury a peremptory instruction to return a verdict in favor of plaintiff for the full amount claimed, which was done, and upon which judgment was rendered. Defendant appeals.

The assignments of error are: (1) The verdict is not sustained by sufficient evidence; (2) the verdict is contrary to law; (3) errors of law occurring at the trial; (4) the court erred in sustaining the motion of the plaintiff directing the jury to return a verdict for the plaintiff; (5) the court erred in giving the instructions directing the jury to return the verdict for plaintiff; and (6) error in overruling the motion for a new trial.

There is no evidence in the record of any improper effort on the part of defendant to induce plaintiff to make the purchase of a half interest in the business. So far as the evidence discloses, no criticism can be made upon the conduct of defendant, its officers or agents, in the nego-

tiations leading up to and including the execution of the written contract, above set out, and the payment of the \$500. The evidence is also clear that in making the purchase the plaintiff knew of the presence of the slot machines, the uses to which they were and would be applied, and that he was purchasing a half interest in them, and to which he offered no objection, and was entirely willing to make the purchase. At the time of the purchase the use of the slot machines was common in practically all the cigar stores in the city of Omaha, as well as elsewhere, and there seemed to be no thought among proprietors of establishments owning them that their use was in violation of law, or was subject to condemnation. But these considerations cannot enter into the case as controlling the rights of the parties, however much the course pursued by plaintiff may be condemned by fair-minded people as showing a want of the proper conception of business integrity. The contract of purchase was never executed. Nothing was done subsequent to the payment of the \$500 and the invoice. It does not appear that plaintiff entered into possession, or took any part in the management of the business. The slot machines were so operated that the operator by placing his coin within and starting the action of the machine stood to win or lose by a chance. This constituted gambling and the machines gambling devices. *Lang v. Merwin*, 99 Me. 486; *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338, annotated in 20 L. R. A. n. s. 239. It would therefore follow that defendant's business, at least to the extent of the use of the slot machines, was an illegal one. The machines constituted a part of the stock purchased by plaintiff. Their use constituted a part—an important part—of the carrying on of the business. It must follow that the contract of purchase was an illegal one. It seems to be the general holding of the courts that, so long as an illegal contract remains executory and the illegal purpose has not been put into operation, the one who has paid money thereon to the other party may repudiate the contract and recover back the money. *Stover*

v. Flower, 120 Ia. 514, and cases there cited; *McCall v. Whaley*, 52 Tex. Civ. App. 646, 115 S. W. 659.

It is urged by defendant that plaintiff having first repudiated the contract and demanded the repayment of the \$500, not upon the ground of the illegality of the contract, but because his father so demanded, he cannot "mend his hold" by afterward assigning the illegality of the contract as his reason for his action, and that he is now estopped to defend upon the latter ground. Without deciding whether any estoppel could exist in this kind of a case, we think it sufficient to say that no such estoppel is pleaded in the answer. Estoppel to be available must be pleaded. 1. Neb. Syn. Digest, p. 1181.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

BARNES and SEDGWICK, JJ., dissenting.

We are unable to concur in the majority opinion. While there can be no doubt of the soundness of the conclusion that a contract to do an illegal thing may be rescinded by either party before it is completed, yet it is equally clear that one who attempts to avail himself of that rule must show that the contract which he seeks to rescind provides for the doing of some illegal act. It seems to us that the defendant failed to make such a showing. There is nothing in the agreement of sale or in the transactions which took place between the plaintiff and defendant, as disclosed by the record, which requires either party to do an illegal thing. The contract did not require the use of slot machines in the business after the sale to the plaintiff. He was at liberty to insist on the discontinuance of their use if such use was illegal, and the presumption is that their use would have been discontinued. The machines in and of themselves were harmless and could be legally sold. The contract between the parties is a simple one, and, so far as the substance of it is concerned, it is perfectly fair and legitimate. It is true that the defendant stated in his testimony as a justification of his past conduct in using

the machines that all others engaged in the cigar business did so, and that it had been a necessary part of the business, but it does not appear that when their use had been declared illegal the defendant designed to continue such use. The contract does not mention the slot machines. It simply appears in the evidence that there were such machines amongst the property and that they had been used in the business, and it seems that their use theretofore had not been considered unlawful by the defendant. After the completion of the sale plaintiff would have had equal authority with the defendant to control the manner of conducting the business, and there is nothing in the agreement that directly or indirectly binds either of them to continue the business in the same manner in which it had been transacted. There being no agreement in the contract for the use of the slot machines in the business, the parties did not agree to do an illegal thing, and we doubt whether the law will presume that they contemplated such a course. Even if they did at that time intend to use the machines, there was no binding agreement that they should continue to do so. The plaintiff could at any time put a stop to it, and the presumption is that he would do so.

To our minds the record clearly shows that the plaintiff is trying dishonestly to avail himself of an afterthought to avoid a perfectly legal contract which was entered into by both parties in good faith, and that his real reason for seeking a rescission and recovery of the money paid to bind the bargain is that his father persuaded him to engage in a different business at another place. No presumption of the illegality of the contract should be indulged in to enable him to recover the earnest money paid, which, so far as the record discloses, was not more than sufficient to indemnify the defendant for the interruption of his business and the time spent in taking the inventory which was made at plaintiff's request to ascertain the amount he was to pay for a half interest in the defendant's cigar and tobacco business.

State v. Holt County.

To our minds the judgment of the district court was wrong and should be reversed.

ROSE, J., concurs in this dissent.

STATE, EX REL. JACOB L. HERSHISER, APPELLEE, V. HOLT
COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,449.

1. **Judgment: ASSIGNMENT: RIGHTS OF ASSIGNEE.** The assignee of a judgment takes it subject to all equities and rights which the judgment debtor had against the judgment creditor before the assignment.
2. **Counties: JUDGMENT: ASSIGNMENT: SET-OFF.** Where a claim against a county was presented to the county board and rejected, and from which an appeal was taken to the district court, where plaintiff prevailed, it is within the power of the board, upon the presentation of the judgment as a claim for allowance and the issuance of a warrant, to deduct from the amount due any delinquent personal taxes due from the claimant, and that right cannot be destroyed or taken away by the assignment of the judgment.
3. ———: ———: **SET-OFF.** Section 4468, Ann. St. 1909, authorizing county boards to plead unpaid delinquent taxes as an offset in a suit against a county, is permissive and does not deprive the board from deducting the amount of the taxes due from a judgment rendered in the district court on a claim rejected by them when filed in the first instance.

APPEAL from the district court for Holt county:
JAMES J. HARRINGTON, JUDGE. *Reversed and dismissed.*

Edward H. Whelan, for appellants.

R. R. Dickson, contra.

REESE, C. J.

For the years 1901 and 1902 the personal property taxes levied against M. A. McCafferty amounted to \$226.69.

State v. Holt County.

Prior to the 1st day of August, 1904, the said M. A. McCafferty filed her claim against the county of Holt with the county board for damages resulting from the establishment of a county road over and across her real estate in said county. The claim was disallowed, when she appealed to the district court, filing her appeal on the day named. Such proceedings were had in that court as resulted in a judgment in her favor against the county for the sum of \$200, which, with interest and costs, on or about the 13th day of March, 1908, amounted to \$13.90 more than the taxes, interest and costs standing against her. On the 11th day of February, 1908, she, for a valuable consideration, transferred the judgment to the relator in this case. He applied to the county board for the issuance to him of a warrant on the county treasurer for the amount due upon the judgment, when the board deducted the amount owing for taxes and issued and tendered a county warrant for the \$13.90, the difference, and paid the taxes. Relator, whom we will designate as plaintiff, brought his suit in the district court for a mandamus against the officers of the county to compel the issuance of a warrant for the whole amount due upon the face of the judgment, without offsetting the taxes. Upon a trial to that court a peremptory writ of mandamus was awarded. The county appeals.

It is agreed by both parties to the suit that the only question involved and requiring a decision is whether or not the county had the legal right to apply the unpaid personal taxes of 1901 and 1902 as in satisfaction of the judgment to the extent of the amount due, after the transfer of the judgment to plaintiff. In other words, whether the judgment so far partakes of the quality of negotiability as to permit its transfer so as to cut off the right of the county to deduct the taxes due and unpaid. There is no doubt that a judgment, as any chose in action, is assignable. There is no doubt that the assignee of a judgment obtains no higher or greater right than his assignor had. In 2 Freeman, Judgments (4th ed.) sec. 427, it is said:

"The assignee of a judgment receives the same subject to all existing equities between the parties thereto; and it is immaterial whether he had notice of these equities or not. The assignee, by virtue of the assignment, occupies no better position than the judgment creditor would have occupied, in the absence of any assignment. Hence, he cannot deprive the debtor of the benefit of payments made before receiving notice of the assignment, and of the existence of which the assignee was ignorant. The power of the court to set off one judgment against another is not terminated by an assignment. A purchaser and assignee of a judgment, even for a valuable consideration, and without notice, takes subject to a right of set-off existing at the time of the assignment; for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor," etc. A number of cases are cited by the author in support of each proposition. True, cases can be found holding the other way, some of which are cited in the same section of Freeman; but it is believed that they depend upon special features which are not found in this case. See, also, 17 Am. & Eng. Ency. Law (2d ed.) 883; 23 Cyc. 1422.

Mrs. M. A. McCafferty, plaintiff's assignor, had formerly been engaged in the mercantile business in O'Neill, at which time the unpaid taxes were duly levied for the years above referred to. The law (Comp. St. 1909, ch. 18, art. I, sec. 48; Ann. St. 1909, sec. 4466) gives the county board authority to deduct delinquent personal taxes from the amount found due upon the claim. The assignee was conclusively presumed to know the law. The tax records of the county showed the amount of delinquent taxes due. The records were open to his inspection. Had no assignment been made, the deduction could have been made as against the assignor, none the less as against the assignee. By statute (Ann. St. 1909, sec. 10914) unpaid personal taxes are a lien upon the personal property of the tax debtor; and that lien was in full force at the time of the assignment, unless it had been waived by the board in not

setting up and offsetting the taxes in the suit in which the judgment was rendered. Section 4468, Ann. St. 1909, provides: "In any suit against a county, any delinquent personalty taxes assessed against the person in whose favor the cause of action accrued may be set off against any amount claimed in such action." The contention of the county attorney is that the provision of this section can apply only to suits on such claims and demands as may be instituted in the first instance in the district court, without first filing the claim with the county board and taking its judgment thereon, and from which appeals may be taken. Without deciding this point, we deem it sufficient to say that at most this section is merely permissive, and the remedy given is cumulative. The board may deduct the taxes from a claim allowed, or it may plead them as an offset. In the case of the claim out of which the judgment arose, the action of the board was to reject the claim. The members thereof evidently did not believe the claimant had any just claim against the county, else it would have allowed it in whole or in part. In that event they (presumably) would have deducted the taxes. It would have been an anomalous proceeding for them to deny any indebtedness and at the same time present an offset against that which they said and claimed the county did not owe. After judgment the claim would have to be presented for payment and the issuance of the warrant therefor. At that time, and before issuing the warrant, they could deduct the taxes and issue the warrant for the balance due. This seems to have been the course pursued. The orderly time for the deduction of the taxes would be when the claim based on the judgment was presented for allowance and the granting of the warrant for its payment.

The judgment of the district court is reversed, and the case is dismissed.

REVERSED AND DISMISSED.

MARGARET LUND ET AL., APPELLEES, v. NELS P. NELSON ET AL., APPELLEES; NELS A. RENSTROM, APPELLANT.

FILED JUNE 13, 1911. No. 16,463.

Tenancy in Common: ADVERSE POSSESSION. Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations; an actual ouster should be presumed, although not otherwise proved.

APPEAL from the district court for Burt county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Henry E. Maxwell and E. D. Pratt, Jr., for appellant.

J. A. Singhaus, contra.

REESE, C. J.

This is an action to quiet the title to the northwest quarter of section 3, township 21 north, range 8, in Burt county. As would be suggested by the great number of parties to the suit, the petition is of considerable length caused by the necessity of showing the chain of title from the representatives of deceased owners, heirs and other interested parties. As we view the case, it can serve no good purpose to set out even an epitome of the pleadings. It appears that plaintiffs are the widow and heirs of Hakan T. Lund, deceased, who held title to twenty-four twenty-fifths of the land in dispute by record title, the deed having been executed to him by defendant on the 14th day of April, 1890, who was the owner of the property conveyed—that is the twenty-four twenty-fifths thereof. We can detect no claim that plaintiffs' title to this portion of the property is questioned. The sole contention is as to the ownership of the remaining one twenty-fifth. It is not claimed by plaintiffs that they or the husband and father ever had title by deed to the one fractional

part. If they are not the owners of that interest by adverse possession and limitation, they do not own it, and defendant and his coheirs of a previous owner do. The cause was tried to the district court, which found in favor of plaintiffs, and quieted the title to the whole tract in them. Defendant Renstrom appeals.

The whole question arises upon the question of adverse possession and limitation. Hakan T. Lund purchased the twenty-four twenty-fifths interest on the 14th day of August, 1890, and immediately took possession of the whole tract; and he, up to the time of his death, a short time before the commencement of this action, and his family, since that time, have remained in possession, residing on and making it their permanent home, improving the land, constructing buildings, farming and fencing it, as owners, paying all the taxes, and receiving all the income therefrom. So far as is shown by the evidence, no one has ever made any claim of title to the one twenty-fifth, nor has any demand ever been made for a division of products, or the proceeds thereof, nor for the payment of rent. There has been no disturbance of the possession in any manner or at any time. During this period the names of the original owners of the one twenty-fifth interest were unknown, nor was it known by Lund where they could be found. Lund is deceased, and hence his testimony is lost; but the testimony of his family was taken, and his conduct and statements of claim of full ownership were shown.

But it is claimed that Lund and the owners of the one twenty-fifth interest were tenants in common; that the possession of one tenant in common is the possession of all, and therefore the statute of limitation could not run in favor of the tenant in possession until there had been an ouster of the other tenant or a denial of his right, which would be an equivalent. This is the general rule applicable to such tenancies, and the sole question is: Should it be applied to this case? Upon this we are not free from doubt. The authorities are not in entire har-

mony; but, as we view the case, guided by the best lights we have, the decree of the district court is probably correct. *Lodge v. Patterson*, 3 Watts. (Pa.) 74; cases cited in *Warfield v. Lindell*, 30 Mo. 272. In *Thomas v. Garvan*, 4 Dev. (N. Car.) 223, it is held that the sole enjoyment of the property by one tenant in common is not of itself an ouster of his cotenant, the possession of one being the possession of all; but the sole enjoyment for a great number of years, without claim from another having right, and under no disability, becomes evidence of title and raises the legal presumption of an ouster. See, also, *Mehaffy v. Dobbs*, 9 Watts (Pa.) 363, 376; *Frederick v. Gray*, 10 Serg. & Rawle (Pa.) 182, 187; *Cloud v. Webb*, 4 Dev. (N. Car.) 290; *Lefavour v. Homan*, 3 Allen (Mass.) 354; *Laraway v. Larue*, 63 Ia. 407; *Knowles v. Brown*, 69 Ia. 11; *Feliz v. Feliz*, 105 Cal. 1; *Beall v. McMenemy*, 63 Neb. 70; Angell, Limitations (6th ed.) sec. 390.

The decree of the district court is

AFFIRMED.

Root, J.

I concur in affirming the judgment of the district court for the reasons following: As I understand the record, Nels A. Renstrom by purchase and by descent acquired title to an undivided twenty-four twenty-fifths part of the real estate. The other one twenty-fifth part vested in Gotfred Anderson, subject to the curtesy estate of his father. Gotfred Anderson is named as a defendant, and if in life, and jurisdiction was acquired over him or his interest in the land, the decree quiets that title in the plaintiffs. Nels A. Renstrom in 1890 conveyed by warranty deed to the plaintiffs' ancestor an undivided twenty-four twenty-fifths interest in this land. In the chain of title preceding this conveyance, some of the deeds describe the entire section, while others, after thus describing the land, recite: "Excepting and reserving in said deed of conveyance an undivided one twenty-fifth interest therein." None of these grantors ever acquired Got-

Goodson v. Goodson.

fred Anderson's interest in the land, so that, whether the deeds purported to convey the quarter section or reserved a one twenty-fifth part thereof, the grantor's title in the land, to wit, an undivided twenty-four twenty-fifths part, was conveyed. The appellant has no title to or interest in this land, is not a tenant in common, and the question of adverse possession does not arise in the case.

The decree of the district court is clearly right, and is properly affirmed.

HELEN GOODSON, APPELLANT, v. ABRAHAM E. GOODSON,
APPELLEE.

FILED JUNE 13, 1911. No. 16,477.

1. **Divorce: EXTREME CRUELTY: EVIDENCE.** Action for divorce from bed and board and separate maintenance upon the ground of extreme cruelty. The prayer of the petition being denied by the district court, plaintiff appeals. The conclusions arrived at from reading the bill of exceptions are set out in the opinion, and it is found that, while the results of plaintiff's marriage with defendant have been most unfortunate, no sufficient reason is discovered why the decree of the district court dismissing plaintiff's petition should not be affirmed.
2. ———: **AFFIRMANCE.** No question of law being involved in the case, the decree of the district court is affirmed upon a review of the established facts.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Charles S. Elgutter, for appellant.

Smyth, Smith & Schall, contra.

REESE, C. J.

This action, by the wife and against the husband, is for a decree of separation from bed and board and for maintenance. The petition was filed in the office of the

clerk of the district court for Douglas county on the 9th day of November, 1908, in which it was alleged that plaintiff and defendant were married in the city of Omaha on the 12th day of November, 1907, and that they lived and cohabited together until the 8th day of September, 1908, when, on account of the extreme cruelty of defendant to plaintiff, she left him, and since which time they have not cohabited together. The acts of alleged cruelty are set out in the petition, which, if established by proof, would entitle plaintiff to the relief sought. The marriage, at the time and place alleged, is admitted in the answer; but the several acts of cruelty alleged are specifically denied, and it is alleged that prior to the marriage defendant had been previously married and had two children of tender years, one of which was a boy, and the other a girl, the younger, all of which plaintiff well knew; that those children and plaintiff constituted defendant's family; that soon after the marriage plaintiff formed a dislike to one of defendant's children, the little girl, and within two months after the marriage threatened to leave defendant unless he sent the child away, which he did, by placing it with his mother; that he afterward caused the child to be returned to his home, when plaintiff left and has not since returned. The reply is a general denial, except as to the knowledge of defendant's previous marriage and of his two children. A trial was had to the court, which resulted in a modified finding against plaintiff, and a denial of the decree of separation. Plaintiff appeals.

There is no serious question of law involved; the contention of plaintiff being that the decision of the district court is not sustained by, and is contrary to, the evidence. The case was argued at the bar of this court, and the evidence has been elaborately briefed by counsel for both parties. We do not deem it necessary to set out, nor specifically review, the facts nor the testimony of the various witnesses, as no possible good could result therefrom, but choose rather to state our conclusions there-

from. Upon a thorough consideration of all the evidence, we are satisfied that the marriage has been a most unfortunate one for plaintiff. Prior to her marriage she was in good health, and a comparatively sound woman, but of a delicate nervous system and temperament. Soon after the marriage she became pregnant, and by reason thereof she lost her health, suffered great pain, and became very nervous, finally verging on to nervous prostration. The prostration of her nervous system continued after the birth of her child (which died the second day after its birth), and so continued up to the time of the trial of this case. There is no doubt of her apparent unreasonable dislike of, and her aversion to, defendant's little girl. But this, while unreasonable, is explained by the overwhelming proof as to her mental and physical condition, and which should have called forth the sympathy and charity of her husband, who, as he was closely connected with the medical profession, being a massage artist in the office of two prominent medical practitioners, should have extended his help, aid and assistance to her, and overlooked her unreasonable demands and her peculiarities, no doubt produced by her marriage to him, which he, to some extent, failed to do. As a provider for the household and his willingness to meet her every physical and financial demand he seems not to have been wanting. What he really lacked was charity and comradeship for his wife in her mental and physical distress. He seems to have been willing to supply all her physical wants, and sought to have her return to his home after her departure, yet, when inexcusably exasperated by her talk and demeanor, he sought and threatened to commit suicide. He never committed any violence as against her, nor, if his testimony is to be believed, threatened any; yet, since he was in a degree responsible for her weakened and distracted mental condition and her physical ailments, he seems to have withheld from her that sympathy, forbearance and fellowship he might and should have extended to her at that critical time in her life. In her

Wheeler v. Abbott.

condition the very presence of the little girl in the home seemed to render her distracted, while she was warmly attached to the child's brother, a few years older, from the beginning. The whole of her married life was most unfortunate and distressing, and she is entitled to, and should receive, the active sympathy of all.

We are unable to see that the decree of the district court should be reversed. It is therefore affirmed, but at the cost of the defendant.

AFFIRMED.

FRANK W. WHEELER, APPELLANT, v. MILO F. ABBOTT,
APPELLEE.

FILED JUNE 13, 1911. No. 16,499.

1. **Trial: MOTION FOR VERDICT: ADMISSION.** Where upon a jury trial, at the close of plaintiff's evidence, the defendant moved the court for a directed verdict in his favor, the motion must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted and all proper inferences to be drawn therefrom.
2. **Husband and Wife: CRIMINAL CONVERSATION: ALIENATION OF AFFECTIONS: QUESTIONS FOR JURY.** In an action of criminal conversation and for damages for the alienation and estrangement of the affections of a wife by a stranger, where the evidence submitted tended to prove improper conduct and undue familiarity between the wife and defendant, the questions of the weight of the testimony of the witnesses and the inferences to be drawn from the evidence are for the determination of the jury.
3. ———: ———: **CIRCUMSTANTIAL EVIDENCE.** The crime of adultery being seldom susceptible of direct proof by eye-witnesses, resort must be had to circumstantial evidence.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

J. E. Willits, for appellant.

John C. Stevens, contra.

REESE, C. J.

This is an action by plaintiff, appellant, against the defendant, appellee, for damages for the alienation of the affections of plaintiff's wife and their alleged criminal conversation. The averments of the petition are stated in plaintiff's brief, and are here produced as there stated: "(1) That Mattie May Wheeler is the lawful wife of the plaintiff, and has been such ever since the 16th day of February, A. D. 1886. (2) That on or about the 1st day of March, A. D. 1905, and on divers other days between that date and the commencement of this action, the defendant Milo F. Abbott, wrongfully, wickedly, wilfully, maliciously and unjustly cohabited, associated and kept company with, and carnally and criminally knew, one Mattie May Wheeler, then and still being the wife of the plaintiff, and thereby the affection of said Mattie May Wheeler for the plaintiff was alienated and destroyed, and the plaintiff has been deprived of the comfort, fellowship, services, society, marital relation and assistance of his wife in domestic affairs, and has been brought into dishonor and disgrace, and has suffered great mental anguish and injured feelings, all to his damage in the sum of \$10,000."

The answer of defendant is a general denial of each and every allegation contained in the petition. A jury trial was had, and at the close of plaintiff's evidence the court, on motion of defendant, instructed the jury to return a verdict in favor of defendant, which was done. A motion for a new trial was filed, overruled, and judgment of dismissal, with costs against plaintiff, was rendered. Plaintiff appeals.

There is but one contention presented by plaintiff, which is the general one that the court erred in giving the instruction complained of. This involves an examination of the evidence offered by plaintiff, as no testimony was offered by defendant. We have read all the evidence introduced as shown by the bill of exceptions. Upon the

oral argument much was said against plaintiff's character as a provider for his family, his lack of industry, etc.; but nothing of this kind is shown by the evidence. Upon the contrary, it appears that plaintiff has been under employment for many years at fair wages, having been in the service of the United States as mail carrier on a rural route for the last 7 years, devoting his income to the support of his family, consisting of his wife and four children. He and his wife were married in 1886, and lived happily together until the advent of defendant into the family. The home was finally broken up, the marital relations between plaintiff and wife interrupted, and finally terminated. While there is evidence of conduct on the part of the wife and defendant which cannot be approved, such as associating together of evenings and nights away from home, riding together, leaving plaintiff alone, her refusal to cohabit with him, and exhibiting a decided preference for the association of defendant, yet there is a possible explanation which tends to remove a suspicion, which might otherwise be well founded. Plaintiff and defendant are brothers-in-law; defendant's deceased wife having been a sister of plaintiff. There is no relationship by consanguinity between defendant and plaintiff's wife. They lived as one family at the home of plaintiff, eating at the same table. Defendant and plaintiff's wife had formed some kind of a partnership in the dairy and vegetable gardening business. Plaintiff's work upon the mail route required his absence from home during the day. As expressed by one witness, plaintiff "didn't seem to be very much in it," and the conduct of the family toward plaintiff was "as though he was an interloper." In the fall of 1907, the last week of August or the first week in September, defendant and plaintiff's wife were "down town here seven nights from 9 to 11 o'clock at night, and till 12 o'clock for seven nights during the two weeks," and other times that plaintiff could not remember. Other witnesses testified that their conduct toward each other was very familiar. It is not deemed necessary to follow this subject

further. Unexplained, the conduct of these parties might lead thinking right-minded people to but one conclusion, that is, as expressed by some of the witnesses, "there was something wrong." It may be that the suspicion and belief of plaintiff had no actual foundation in fact for their support, yet the evidence, if true, might lead to the opposite conclusion. There is no doubt of the estrangement of plaintiff's wife. It may be that the conduct of defendant toward her was not the cause of such estrangement and refusal on her part to cohabit with plaintiff; but, in the face of the evidence given, it would have been much better had explanations been made. Defendant knew of the estrangement, and was notified of the fact by plaintiff, and that plaintiff desired the relation between his wife and defendant to cease; but the request was unheeded.

It is true that there was no direct proof of the commission of the crime of adultery between defendant and plaintiff's wife; but, as said in *Smith v. Meyers*, 52 Neb. 70: "It was not indispensable to a recovery that the acts of sexual intercourse should have been established by the testimony of a disinterested eye-witness. Adultery would be very difficult of proof if such were the rule; but it may, like any other fact, be established by circumstantial evidence." The demurrer to the evidence must be held, for the purpose of passing thereon, as an admission of the truth of all material and relevant testimony. We do not express any opinion as to the merits of the case, nor as to the weight of the testimony of any witness, nor, indeed, as to any inference to be drawn from the facts proved. If the evidence tended to sustain the averments of the petition, the case was for the decision of the jury, under proper instructions, and not for the court. In causes tried to a jury, the jurors are the triers of questions of fact.

The judgment of the district court is reversed, and the cause is remanded to that court for further proceedings.

REVERSED.

FAWCETT, J., concurs in the conclusion.

HENRY MORGENSTERN, APPELLEE, V. INSURANCE COMPANY
OF NORTH AMERICA, APPELLANT.

FILED JUNE 13, 1911. No. 16,491.

1. **Insurance: PROOF OF LOSS: WAIVER: ACTS OF AGENT.** The agent of a fire insurance company in charge of and having power to adjust a loss may, by his conduct, waive proofs of loss, notwithstanding the fact that the policy contains a provision that no person is authorized to act in any manner relating to the insurance unless duly authorized in writing.
2. ———: ———: ———: **EVIDENCE.** Evidence as to waiver of proofs of loss examined, and found sufficient to sustain the verdict of the jury on that question.
3. **Appeal: INSTRUCTIONS: PREREQUISITES TO REVIEW.** It is no doubt the duty of the district court in a civil action to state the substance of the issues to the jury, and this should be done without request; but, if the judge fails to do so, he should be requested to charge as desired, and, if he refuses to so charge, exception should be taken in order to predicate error for such failure.
4. ———: ———: **BURDEN OF PROOF.** Action on a valued policy of insurance. One of the defenses interposed was the alleged criminal destruction of the property by the assured. The evidence upon that point being wholly insufficient to sustain such a charge, *held* not reversible error for the court to refuse to instruct the jury that the burden of proof was on the plaintiff to show that the fire was not caused by his own criminal act.
5. **Evidence examined, and found sufficient to sustain the verdict.**

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

A. S. Churchill and H. A. Lambert, for appellant.

E. B. Quackenbush, contra.

BARNES, J.

Action upon what is known and described by section 43, ch. 43, Comp. St. 1909, as a "valued policy of insurance." The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that on the 6th day of November, 1906, the defendant issued its policy of insurance to the plaintiff, and thereby insured his buildings and property situated on certain lots in Auburn, Nebraska, and used as a lumber yard, for the sum of \$1,000; that on the 10th day of the following March the property insured was destroyed by fire; that the defendant refused to pay the loss, and this suit was brought to recover the amount named in the policy and \$150 as an attorney fee.

The petition, in addition to the usual averments in such cases, contained an allegation, in substance, as follows: That on or about the 15th day of March, 1907, plaintiff notified defendant in writing and verbally of said fire and the loss of said property thereby, and also notified the local agent of the said defendant of said loss, and requested him to notify the company. Thereafter, to wit, on or about the 16th day of April, 1907, defendant stated to plaintiff that there was nothing to do but to pay his loss under said policy, and requested the plaintiff to take a less sum than the amount called for by said policy; that subsequent to giving said notice, as above set forth, defendant sent its representative and adjuster to the city of Auburn, Nebraska, the scene of said fire, to examine into and investigate the same and the cause thereof; that on or about the 10th day of April, 1907, its representative did make such investigation, and after making the same said defendant absolutely and unconditionally refused to pay said loss, and absolutely and unconditionally denied any liability whatsoever upon said policy; that no objection was made by the defendant company to the sufficiency of notice or proof of loss, and no request was ever made upon plaintiff for any other or further notice of proof of loss, by reason of which said facts said defendant waived notice and proof of loss.

The petition concluded with a prayer for a judgment for \$1,000, with interest and costs, and attorney's fee of \$150. To this petition the defendant answered, admitting its incorporation, the issuance of the policy, the destruction of

perty by fire, but denied that such destruction was caused, and alleged as an affirmative defense "that said fire was caused by and through the criminal fault of the plaintiff, and whatever injury, if any, sustained by the plaintiff, is the result of the plaintiff's own criminal fault in causing said fire." The reply was a general denial. Upon the issues thus presented the cause was submitted to a jury, and a verdict was returned in favor of the plaintiff for the sum of \$1,010.21, upon which a judgment was rendered, as above stated.

The defendant has assigned numerous errors, which will be considered and disposed of, so far as may be necessary, in the order in which they were presented.

Defendant's brief contains 18 exceptions to the admission of the testimony of one C. O. Snow, its local agent at Auburn, who issued the insurance policy in question. It is first insisted that the district court erred in permitting Snow to answer question No. 37, found in the bill of exceptions, over defendant's objections. The following is the question: "During the 60 days immediately following the 10th of March, 1907, did you see Mr. C. M. Richards, the adjusting agent?" This question was objected to as immaterial, irrelevant and incompetent, and nothing to show that C. M. Richards had anything to do with this matter. The objection was overruled, and the witness answered, "Yes, sir." As above stated, Mr. Snow was the local agent of the defendant company, and the record discloses that before question No. 37 was put to him he had testified without objection, in substance, as follows: That he was the local agent of the defendant company at Auburn, Nebraska; that he had a recording agency; he had identified the policy in question, and testified that it was his signature at the bottom of it. He was then asked: "Do you know, Mr. Snow, who was the adjusting agent for the Insurance Company of North America, the defendant in this case, for this territory, during the years 1906 and 1907? I will confine it to 1907. A. I know who acted in that capacity. Q. Who was it? A. I don't be-

Morgenstern v. Insurance Co. of North America.

lieve I can give his initials; his name is Richards. Q. Have you anything to refresh your memory from? A. Yes. Q. State definitely if you can do so. A. Maybe I can refresh it right here, I don't know. C. M. Richards. Q. Where does he reside? A. At Omaha, Nebraska." Witness then testified that he notified the company by letter at its home office in Erie, Pennsylvania, and also notified special agent Richards of plaintiff's loss.

It thus appears that the witness had testified without objection that C. M. Richards was the adjusting agent for the defendant company in Nebraska at the time the loss in question occurred. His testimony was competent to show what action, if any, was taken by Richards for the company in regard to the adjustment or payment of the plaintiff's loss. It further appears that this evidence was competent as tending to establish the waiver of written proof of loss upon which plaintiff relied.

The remaining objections to the testimony of this witness were based upon practically the same grounds, and the foregoing is sufficient to dispose of all of them. It is only necessary for us to say that the object of this testimony was to show the waiver upon the part of the defendant company which the plaintiff had alleged in his petition, and upon which he had relied as a reason for not furnishing written proofs of loss within 60 days, as provided in his policy of insurance, and it tended to establish that fact.

It is next contended that the court erred in overruling defendant's objections to certain questions propounded to the plaintiff while upon the witness stand. Without discussing these objections separately, it is sufficient to say that the testimony was offered for the purpose of showing the conduct of the company by which it was claimed it had waived the requirement of written proof of loss. It related to interviews between the plaintiff and C. M. Richards, who it was claimed was the defendant's special agent and adjuster in charge of the loss in question. This testimony was competent and was properly received by the trial court for the purpose of establishing that fact.

we have carefully examined the record as to the assignments of error relating to the admission and exclusion of testimony in this case, and find no reversible error therein. The defendant assigns numerous errors in the instructions. The first assignment is that the court erred in not instructing the jury what the issues were, as made by the pleadings.

An examination of the charge as a whole convinces us that it was sufficient to inform the jury of the facts in issue and which they were required to decide. It appears, however, that the defendant cannot successfully urge this assignment, because it made no request for an instruction of that kind. It is no doubt the duty of the court to state the substance of the issues to the jury, and this should be done without request; but, if the judge fails to do so, he should be requested to charge as desired, and, if he refuses to so charge, an exception should be taken. *Barney v. Pinkham*, 37 Neb. 664; *Sanborn v. Craig*, 52 Neb. 483; *Helwig v. Aulabaugh*, 83 Neb.

A complaint is also made of the refusal of the court to give instruction No. 1, requested by the defendant, which in substance, that the plaintiff had the burden of proof to establish that the fire was not the result of his criminal negligence. There are some authorities which hold contrary to this view; but we are not required to determine the question. The plaintiff alleged, in general terms, that the insured property was totally destroyed by fire without criminal fault or negligence on his part. The defendant denied; but not being content to rely on the issue thus presented, it went further and alleged an affirmative defense that the plaintiff by his own criminal act set the fire which destroyed his property. The specific allegation was denied by the reply, and upon the issue evidence was introduced which is not only sufficient to establish plaintiff's innocence of the charge, but conclusive upon that point, and the jury could not have acted otherwise. It follows that if the refusal to give instruction requested was error, which we do not here

determine, it was error without prejudice. We have read all of the instructions tendered and refused, as well as those which were given to the jury, and are of the opinion upon that branch of the case that the record is without reversible error.

We come now to consider the question of waiver. This is the only point upon which the evidence is conflicting. The court instructed the jury that the burden of proof was on the plaintiff to establish the waiver alleged in his petition, and, unless he had established that fact by a preponderance of the evidence, they must find for the defendant. It is contended by defendant that there is no competent evidence in the record upon which to predicate a waiver, and it is insisted that there could be no waiver unless the same was indorsed in writing on the policy by some one who was authorized to make such indorsement. This contention cannot be sustained, for the more recent authorities hold that the company may, by its conduct, waive proof of loss when it has notice of the breach of such condition; that notice to the agent is notice to the company, and such waiver need not be in writing. *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559; *Billings v. German Ins. Co.*, 34 Neb. 502; *Hollis v. State Ins. Co.*, 65 Ia. 454; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Harris v. Phoenix Ins. Co.*, 85 Ia. 238.

It is also well settled that the provision of an insurance policy requiring waiver to be in writing has no reference to proofs of loss and stipulations to be performed after loss. 10 Current Law, 394; *Reed v. Continental Ins. Co.*, 6 Pennewill (Del.) 204, 65 Atl. 569; *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415.

Upon this point the bill of exceptions discloses that on the same day the fire in question occurred the plaintiff requested defendant's recording agent at Auburn to notify the defendant of his loss and request payment of the amount of his policy. The agent immediately notified the home office, and also notified C. M. Richards, who, the testimony shows, was defendant's special agent, with an

Omaha; that Richards, within a day
reached Auburn, but did not call upon
it appears that about the 11th or 12th
Richards again went to Auburn to
question, and whether purposely
saw the plaintiff in relation thereto;
he ascertained the fact that Rich-
ards and had failed to call on him,
Omaha and saw him at his office in
Auburn. Plaintiff testified that Rich-
ards interviewed that there was nothing to
be done; that he also informed him,
referring to a statement made by some per-
son that plaintiff had set fire to his own prop-
erty, the loss; that Richards frequently
said do nothing about it. This testi-
mony of Richards, who insists that he told
plaintiff they were not going to do anything about
it, desired to make further investigation
there; but his testimony does not seem
convincing, for it appears that he wrote a
letter in relation to the matter of the
loss: "Omaha, Neb. April 1, 1907.
Auburn, Neb. Dear Sir: I am
writing from Mr. Morgenstern asking me
to adjust his loss. If you can find
out you would call up Mr. Morgenstern
and in reply to his letter I have requested
that as will be taken care of as soon as
possible, explaining to him, of course,
that real estate, stocks and things of that kind,
if they are given the preference as to
payment that we will get to him as soon as
we hear from you, and oblige, Very
Respectfully, Special Agent." It was shown that
the information contained in that let-
ter. It was not claimed that defendant
refused to make any further or other

proofs of loss, and we are therefore satisfied that the evidence was sufficient to require the submission of the question of waiver to the jury. *Hartford Fire Ins. Co. v. Landfare, supra*; *Griffith v. Anchor Fire Ins. Co.*, 143 Ia. 88; *Nicholas v. Iowa Merchants Mutual Ins. Co.*, 125 Ia. 262; *Harris v. Phoenix Ins. Co.*, 85 Ia. 238; *Green v. Des Moines Fire Ins. Co.*, 84 Ia. 135; *American Ins. Co. v. Gallatin*, 48 Wis. 36; *Alexander v. Continental Ins. Co.*, 67 Wis. 422.

It is contended, however, that the evidence is insufficient to show that Richards had authority to waive proofs of loss. Defendant's local agent testified that Richards was the adjusting agent with whom he had always done business in his territory. In his conversations with plaintiff, Richards did not claim to be without authority to adjust the loss, but, on the other hand, led the plaintiff to believe, for a time at least, that his loss would be adjusted, although later on he refused to acknowledge any liability on the part of the company. These facts, together with the letter quoted above, seem to us to be amply sufficient to establish Richards' authority, and warrant the jury in finding that the plaintiff had established the waiver set forth in his petition. This was a question of fact for the determination of the jury, and was submitted to them under an instruction most favorable to the defendant. We are of opinion that the evidence on this point sustains the verdict. Authority to adjust carried with it the power to waive the formal proofs of loss. *Ruthven Bros. v. American Fire Ins. Co.*, 92 Ia. 316.

Finally, it is contended that the court erred by instructing the jury to deduct from the amount of the policy the value of that part of the platform scales which were situated upon the street, because they could not determine that amount. It is apparent from an examination of the verdict that they made the proper reduction. Otherwise the verdict would have been for \$1,000, with interest from the 10th day of May, 1907, to the time of the trial, while it was for only \$1,010.21. Therefore, upon this point the record is without error.

Swallow v. Eureka Mfg. Co.

It satisfactorily appears that the cause was fairly tried, that the record contains no reversible error, and therefore the judgment of the district court is

AFFIRMED.

CHARLES H. SWALLOW, APPELLEE, V. EUREKA MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,497.

Appeal: PARTIES. A party to an action against whom no judgment has been rendered, or whose rights are not affected by the judgment of which he complains, cannot prosecute an appeal. *Cowherd v. Kitchen*, 57 Neb. 426.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Flansburg & Williams, George A. Adams and Morning & Ledwith, for appellants.

E. C. Strode, J. L. Caldwell and Hall, Woods & Pound, contra.

BARNES, J.

This is an appeal from a decree of the district court for Lancaster county appointing a receiver to take charge of the affairs of the Eureka Manufacturing Company, a domestic corporation, for the purpose of closing up its business, collecting and disposing of its assets and applying the same to the payment of its debts. The action was brought by the appellee, who was a large stockholder in the corporation, and who had indorsed its commercial paper and otherwise become liable for a large amount of its indebtedness, because of the insolvency of the corporation and the refusal of its officers and directors to recognize his rights as a stockholder. The plaintiff had

the judgment, and the corporation and its co-defendants, A. O. Taylor, John F. Kaufman, William Gray, William Leonard and R. C. Hunter, appealed.

It appears from the record that shortly after the decree in question was rendered the Eureka Manufacturing Company was, by the order of the district court of the United States for the district of Nebraska, adjudged a bankrupt, and the referee in bankruptcy took complete charge of its affairs for the purpose of winding up its business and distributing its assets in the payment of its debts under the federal bankruptcy laws. On a showing of that fact and a motion of the plaintiff, in accordance with the rule announced in *Matson v. Emerson*, 2 Neb. (Unof.) 190, and *Washington Mill Co. v. Lincoln Sash & Door Co.* (No. 16,495), not reported,* the appeal of the corporation was dismissed.

It thus appears that the only matters left for our consideration are the rights of the individual appellants above named. An examination of the decree appealed from discloses that no judgment of any kind was rendered against them, and therefore it would seem that there was nothing in the decree from which they could appeal. It is suggested, however, that they were entitled to a jury trial to determine the several amounts found due from the corporation to its intervening creditors. If the corporation was here making this claim, it would be proper for us to consider it; but as no judgment was prayed for, and none was ever rendered against the remaining appellants, their present condition presents nothing but a moot question for our determination. It was stated, however, on the oral argument, that the amounts found and adjudged to be due to certain of the creditors of the corporation may at some future time become a basis of an action against the stockholders to recover on their liability for unpaid stock subscriptions. This question does not require serious consideration. The findings and judgment of the bankruptcy court, which

* No opinion.

Bankers Life Ins. Co. v. County Board of Equalization.

has exclusive jurisdiction of proceedings of that nature, must necessarily furnish the proper basis for determining the amount of the stockholders' liability. Therefore it seems clear that no substantial right of any of the remaining appellants is in any way affected by the judgment of which they now complain.

The decree of the district court is therefore

AFFIRMED.

BANKERS LIFE INSURANCE COMPANY, APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,688.

1. **Taxation: ASSESSMENT: CORRECTION OF RETURN: NOTICE.** Sections 11012, 11031, Ann. St. 1909, relating to the public revenue, authorizes a county assessor to change the schedule of a taxpayer by adding thereto any taxable property which he finds to have been omitted therefrom, upon due notice of his intention to make such change.
2. ———: ———: ———: **DUE PROCESS OF LAW.** The taxpayer has a right to rely upon his sworn return made to the assessor, unless notice is given him of an intention to increase the amount thereof. A change of schedule without notice should be treated as a complaint made by the assessor to the board of equalization, and notice should be given of such complaint and an opportunity for a hearing should be afforded. Any substantial increase of the schedule without notice and an opportunity for a hearing amounts to the taking of the property of a citizen without due process of law, and is void.
3. ———: ———: **ESTOPPEL.** In case the taxpayer files a complaint before the board of equalization objecting to the change in his schedule, and is granted a hearing thereon, he cannot thereafter challenge the jurisdiction of the board over the subject matter of his complaint.
4. ———: ———: **DOMESTIC INSURANCE COMPANIES.** It is probable that under the general provisions of the revenue law of 1903 (laws 1903, ch. 73) domestic insurance companies may be required to list their capital stock for taxation; but, if the capital

Bankers Life Ins. Co. v. County Board of Equalization.

stock is taxed, its value must be ascertained in the manner provided by section 10955, Ann. St. 1909, and when such value is ascertained there must be deducted therefrom the value of the real estate and other tangible property of the company otherwise taxed, and the remainder will furnish the amount upon which the tax against the corporation may be levied.

5. ———: DOUBLE TAXATION. An assessment of the property of a domestic insurance company for taxation which includes its capital stock, its surplus, its contingent reserves, its gross premium receipts mentioned in section 10960, Ann. St. 1909, together with all of its other tangible property, is excessive, and amounts to double taxation, and should not be sustained.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Frank M. Tyrrell, J. B. Strode and N. Z. Snell, for appellants.

Charles O. Whedon, contra.

BARNES, J.

The Bankers Life Insurance Company is a domestic corporation, with a paid up capital stock of \$100,000, having its principal place of business and its home office in Lincoln, Lancaster county, Nebraska. It is what is known as an old line or legal reserve life insurance company. It appears that on the 31st day of May, 1909, the president of that company returned to the deputy county assessor a schedule of its property for taxation in accordance with the provisions of section 10960, Ann. St. 1909, which schedule contained a statement of the gross amount of the premiums received by the company for its Nebraska business for the year ending December 31, 1908, less the amount of premiums on the same business ceded to other companies as reinsurance during the year 1908, also less premiums returned on account of the cancelation of a part of the business above mentioned, together with its office furniture and other personal property, amounting to the sum of \$6,133.82; that thereafter, and on the 14th day of

June, 1909, the county assessor, without notice to the company, indorsed on the schedule above mentioned the following: "Office of County Assessor, Lancaster County, Nebraska. D. R. C. Miller, Assessor, Lincoln, Neb., June 14, 1909. The Bankers Life Insurance Company having returned premiums on new business for Lancaster county business only and office furniture and fixtures, not accounting for their capital stock, contingent reserves or surplus, cash in office or bank, gross premiums received at the Lincoln office or other forms of property, I have therefore, this 14th day of June, 1909, valued the capital stock, surplus, contingent reserves and other forms of property at \$611,000, and added thereto \$3,175, their local return on premiums, making a total of \$614,175, and assessed it at \$122,835. D. R. C. Miller County Assessor."

After making the foregoing indorsement, the county assessor immediately returned the schedule to the county clerk as provided by law. On the 19th day of June, 1907, the insurance company made written complaint to the county board of equalization of the action of the assessor increasing the valuation of its property for taxation as above set forth, and prayed the board to reduce its schedule to the amount shown by its own return thereon, and for such other relief "as shall be just and equitable in the premises." After a hearing upon the complaint above mentioned, the board of equalization overruled the same, confirmed the action of the assessor, and valued and assessed the complainant's property at the sum fixed by that officer in the corrected schedule. The insurance company thereupon appealed to the district court, where the order of the board was reversed and set aside, and the county has appealed from that judgment.

The record presents two questions for our determination: First. Was the action of the assessor and the board of equalization by which there was added the amount of the capital stock and surplus of the complainant to its schedule void for want of jurisdiction? Second. Is a domestic life insurance company required by the present

revenue law of this state to list its capital stock, surplus and contingent reserves for taxation to the extent and in the manner as determined by the county board of equalization in the instant case?

Concerning the first question, we think it may be said that sections 11012 and 11031, Ann. St. 1909, are sufficient in form and substance to authorize a county assessor to change the schedule of a taxpayer, and add thereto such property as he finds to have been omitted therefrom, to the end that all taxable property in this state shall contribute its just share to the support of the government; but before making such change or addition to the schedule he must give notice to the taxpayer of his intention to do so, and thus afford him an opportunity for a hearing. It seems clear from the authorities that such change or addition made without notice and without an opportunity for a hearing somewhere along the line of procedure is void, for it amounts to "taking the property of the citizen without due process of law." *Stuart v. Palmer*, 74 N. Y. 183; *Central of Georgia R. Co. v. Wright*, 207 U. S. 127; *Horton v. State*, 60 Neb. 701; *Dixon County v. Halstead*, 23 Neb. 697. We are therefore of opinion that the act of the assessor in adding the amount of the capital stock and surplus of the insurance company to its schedule, as returned by the proper officer, was void; and, if the company had filed no complaint and made no appearance before the board of equalization, it could have successfully resisted the payment of any tax levied upon the increased valuation of which it complains.

It appears, however, that the company in some way became aware of the change in its schedule, filed its complaint before the county board of equalization, and thereby gave the board jurisdiction to determine the matters complained of. It appears that the case of *Dixon County v. Halstead*, *supra*, was one where the facts were on all fours with those in the instant case. There the addition made by the assessor to Halstead's schedule was treated as a complaint made by him to the county board of equali-

zation; and it was stated that, if the board had served notice on the taxpayer and had given him a hearing, it would have had jurisdiction to act thereon. According to the rule there stated, it seems clear that the change of schedule in this case should have been treated as a complaint by the assessor to the board of equalization, and, the insurance company having appeared before that tribunal and obtained a hearing, it should not thereafter be permitted to challenge the proceeding for lack of jurisdiction.

This brings us to the consideration of the second, and what seems to us to be the main, question in this case. It is contended by the appellant that the capital stock and surplus of domestic life insurance companies should be listed for taxation in the manner pursued in this case by the taxing officers. While, on the other hand, it is claimed by the company that by the express provisions of our present revenue law such companies can only be taxed upon the gross amount of their premiums on Nebraska business for the year preceding the one in which the tax is levied.

Section 10960, Ann. St. 1909, which provides for the taxation of domestic insurance companies, reads as follows: "Every life, fire, or accident insurance company, or surety company, organized under the laws of this state, except fraternal beneficiary associations, and mutual companies that operate on the assessment plan, have no capital stock, and make no dividends, and whose scheme of insurance does not contemplate the return of any percentage of earnings or profits to policy holders, shall be taxed in the county, town, city, village and school district where the agent conducts the business upon the gross amount of premiums received by it for all Nebraska business done within the state during the preceding calendar year, less amount of same ceded to other companies as reinsurance through regularly authorized agents in this state and less premiums returned on canceled policies. Such gross receipts, less reinsurance and cancelations, shall be taken

as an item of property of that value and be assessed and taxed on the same percentage of such value as other property. The agent shall render the list and be personally liable for the tax. If he refuse to render the list, or make affidavit that the same is correct, the amount may be valued and assessed according to the best information of the assessor."

The foregoing section contains the only provisions of our revenue law relating directly to the taxation of domestic insurance companies. It thus appears that it must have been the intention of the legislature to encourage and foster the organization of such companies by placing them, so far as possible, on an equal footing with foreign insurance companies in the matter of taxation. While this purpose was a laudable one and has, without doubt, resulted in retaining large sums of money in this state which would otherwise have been paid to foreign companies, still this fact would not seem to justify the legislature in disregarding the mandate contained in section 1, art. IX of the constitution, which reads in part as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." By this mandatory provision the legislature was required to provide a just and equitable method of taxing our domestic insurance companies, and it would seem that it has failed to perform its full duty in that matter. It is intolerable, however, to contemplate a situation by which the large amount of capital profitably invested in the insurance business by domestic companies may wholly escape taxation and remain exempt from contributing its just share to the maintenance of the protection afforded it by the state. Therefore, in view of the requirement of the constitution, we are inclined to the opinion that the other and more general provisions of the revenue law are broad enough to require such companies to pay a tax upon

their capital stock; but the tax must be based upon the actual value of such capital stock, which, in the present condition of the revenue law, may be ascertained by methods analogous to the manner provided by sections 10955, 10967, Ann. St. 1909, which define methods for ascertaining the value of the capital stock of certain corporations.

So far as the record in this case shows, neither the assessor nor the county board of equalization adopted the method provided by that section. It appears that the assessor added to the value of the gross premiums and tangible property returned for taxation by the insurance company \$100,000 as the value of its capital stock, and \$511,000 as its alleged surplus and contingent reserves, arbitrarily and without investigation, and the county board of equalization adopted and affirmed his action, thereby overruling the complaint of the company and disregarding its prayer for relief. In express terms section 10955, *supra*, provides that after ascertaining the value of the capital stock of the corporation in the manner therein described, there shall be deducted therefrom the value of its real estate and tangible property otherwise assessed, and the remainder is to be taken and considered as the taxable value of its capital stock. It is a fundamental truth, which needs no demonstration, that when the value of the capital stock of a corporation has been correctly ascertained such value embraces not only its surplus, but all of its property and assets of every kind and nature. It therefore appears from the record that the action of the assessor and the order of the county board of equalization were unjust and inequitable, and were made and pronounced without legal authority, for such action clearly falls within the ban of double taxation, which the law does not tolerate or permit.

Finally, the change of the company's schedule cannot be sustained as a penalty for the failure of its officers to return the proper schedule, for such return was made in exact accordance with the provisions of the revenue law

Western Fire Ins. Co. v. County Board of Equalization.

and the demand made by the deputy assessor. So it may be said that there was no justification for the action of the taxing officers, of which the insurance company made complaint, and the judgment of the district court in reversing the order of the board of equalization was correct. It may be said that the statute relating to appeals in such cases confers upon the district court the power to make full investigation and determine the merits of the question presented, and such action should have been taken by the trial court.

For the foregoing reasons, the judgment of the district court reversing the order of the board of equalization should be, and is, affirmed; but, as the proceeding should not have been dismissed, the cause is remanded to the district court for such further proceedings as may be desired in accordance with the views expressed in this opinion.

JUDGMENT ACCORDINGLY.

WESTERN FIRE INSURANCE COMPANY, APPELLEE, v. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,689.

Taxation. For syllabus see *Bankers Life Ins. Co. v. County Board of Equalization*, ante, p. 469.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Frank M. Tyrrell, J. B. Strode and N. Z. Snell, for appellants.

Field, Ricketts & Ricketts, contra.

Fire Insurance Company is a domestic corporation organized under the laws of this state, having its principal place of business in Lincoln, Nebraska. It appears that after it had returned the schedule of its property for duty county assessor for the year 1909, in violation of the provisions of section 10960, Ann. St., the assessor, without notice, added to its valuation of \$53,900 supposed to represent its capital plus. Complaint was made by the company to the county board of equalization, where the action was sustained and the complaint was overruled. Thereupon appealed from the order of the district court for Lancaster county reversed. The board of equalization has brought the appeal.

The law and procedure involved in this controversy, the same as those determined in *Fire Ins. Co. v. County Board of Equalization*, the opinion in that case disposes of all of the questions involved in this appeal without the necessity of further argument or discussion.

The order of the district court reversing the order of the board of equalization is therefore affirmed and the case is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

FARMERS & MERCHANTS INSURANCE COMPANY, APPELLEE, v.
COUNTY BOARD OF EQUALIZATION OF LANCASTER
COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,690.

Taxation. For syllabus see *Bankers Life Ins. Co. v. County Board of Equalization*, ante, p. 469.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Frank M. Tyrrell, J. B. Strode and N. Z. Snell, for appellants.

A. L. Chase, contra.

BARNES, J.

The Farmers & Merchants Insurance Company is a fire insurance company organized under the laws of this state, having its home office and principal place of business in Lincoln, Lancaster county, Nebraska. It appears that after it had made, verified and returned the schedule of its property for taxation to the deputy county assessor for the year 1909, in compliance with the provisions of section 10960, Ann. St. 1909, the county assessor, without notice, added to its schedule the sum of \$142,070 supposed to represent the value of its capital stock and surplus. Complaint was made by the company to the county board of equalization, where the action of the assessor was sustained and the complaint was overruled. The company thereupon appealed from the order of the board, the district court for Lancaster county reversed that order, and the board of equalization has brought the case here by appeal.

The questions of law and procedure involved in this controversy are in substance the same as those determined in *Bankers Life Ins. Co. v. County Board of Equalization*,

ante, p. 469, and the opinion in that case disposes of all of the questions involved in this appeal without the necessity of further consideration or discussion.

The judgment of the district court reversing the order of the board of equalization is therefore affirmed and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

JOHN N. FENTON, APPELLEE, v. TRI-STATE LAND COMPANY,
APPELLANT.

FILED JUNE 13, 1911. No. 16,386.

1. **Waters: IRRIGATION: CONVEYANCES: CONSTRUCTION.** Where an irrigation company purchased the property of a former corporation which had constructed and was operating an irrigation canal under a deed which provided, "subject, however, to any valid rights under certain water-right contracts issued by the Farmers Canal Company for about two thousand (2000) acres of land to various parties owning land under said ditch or canal," and at the time there were on the line of the canal headgates, laterals, and other indicia of the rights of the contract holders, it will be held to have purchased subject to the rights of all claiming under such contracts, since the exception is general in its terms.
2. **Equity** looks at the substance of things rather than the form, and will endeavor to carry out the real intent and purpose of the parties to a contract.
3. **Waters: IRRIGATION: CONVEYANCES: CONSTRUCTION.** Where the intention of the owners of the stock in an irrigation company was to retain certain water rights, and at the same time to convey to other parties their canal and prior appropriation of water, and this was done by means of the transfer of stock and issuance of water right contracts, a court of equity will treat the transaction as it actually was, and not as it appeared to be, in order to protect the rights of the original stockholders.
4. ———: ———: **CONTRACTS: VALIDITY.** An agreement to pay for property in an irrigation ditch by annual payments or by waiving the right to assess the sellers (who were consumers under

Fenton v. Tri-State Land Co.

the ditch) for the maintenance of the ditch is not necessarily invalid as against public policy

5. ———: ———: ———: ———. Under the facts stated in the opinion, a contract made in 1890 with an irrigation company, whereby it agreed to convey and deliver to the other party, his heirs and assigns a specified quantity of water by means of its canal, in perpetuity, conveyed an easement in the ditch, and was not invalid for the reason that the grant exceeded the term of its corporate existence.
6. ———: ———: PRIORITY OF RIGHTS. Where, in 1891, certain owners of an irrigation canal which was in operation for a distance of about ten miles conveyed the same, reserving to themselves a perpetual right to water under a common agreement, the court will apply the provisions of chapter 68, laws 1889, and hold their rights equal as to each other, but superior to those of consumers under a new section of canal beginning at the end of the ten miles already in operation.
7. ———: ———: ———. Under the 1889 act, portions of an irrigation canal may be severable as to the rights of consumers of water.
8. ———: IRRIGATION COMPANIES. A stock corporation formed for the purpose of constructing an irrigation canal, though private as to its manner of organization, is of the nature of a public service corporation. Its rights and duties are modified by the nature of its functions. It cannot serve the public generally, but only the occupiers of land lying under the ditch. Its duties to the respective consumers may be modified and affected by the operation of rights of priority and by the operation of the police powers of the state.

APPEAL from the district court for Scott's Bluff county :
HANSON M. GRIMES, JUDGE. *Affirmed as modified.*

Wright, Duffie & Wright and Isaac E. Congdon, for appellant.

Morrow & Morrow, contra.

LETTON, J.

This is an action to quiet the title of plaintiff to certain water rights, and to enjoin the defendant the Tri-State Land Company from closing or obstructing the plaintiff's

Fenton v. Tri-State Land Co.

lateral headgate and preventing him from conducting through the canal and lateral headgate the amount of water specified in a certain water right contract. The plaintiff and certain cross-petitioners seeking substantially the same relief prevailed in the action, and from the judgment the Tri-State Land Company, defendant, appeals. The pleadings in the case are exceedingly voluminous, covering over 600 typewritten pages; but, since the questions presented are mainly questions of law, it will be unnecessary to do more than state the facts and the principles of law which the contending parties respectively contend are applicable.

In 1887 W. R. Akers, Charles W. Ford, and John Richards incorporated the Farmers Canal Company in Cheyenne county, Nebraska. The articles of incorporation provided that the general nature of the business should be "to acquire, construct, operate and maintain a canal, taking water from the North Platte river in said county and state, and diverting and appropriating water from said river, sufficient at all times to fill said canal, as may be necessary for the use of persons taking water therefrom, and conducting water through said canal, and leasing, selling, and otherwise disposing of water rights to persons owning lands under said canal, for the purpose of irrigation, domestic use, manufacturing and other useful purposes." The authorized capital stock was fixed at \$80,000, in shares of \$100 each. After the incorporation of the company, a notice of appropriation dated September 16, 1889, signed by the president and secretary of the corporation, was posted, setting forth that the company had appropriated a sufficient quantity of water to fill a canal 40 feet wide on the bottom and carrying water to the depth of 4 feet, and naming the point of diversion. Afterwards the incorporators with a number of other landowners in the vicinity subscribed for stock of the corporation. A small amount of the subscription price was paid in cash and the remainder in work upon the canal, for which receipts were given

by the officers of the corporation. W. R. Akers, who was a civil engineer of experience in irrigation matters, had selected what was then believed to be the most favorable location on the North Platte river in the vicinity of the proposed canal as the point of diversion. Little work was done upon the canal that year, but during the three following years nearly ten miles was excavated, a headgate put in, and water turned into the ditch. As originally constructed, the canal was 16 feet wide at the head and about 6 feet wide at the lower end, and was not large enough to water all the land that it was originally intended to serve. In the adjustment of the respective interests of the owners, the water was apportioned by the miner's inch, and it was provided that a 40-acre water right should be represented by one share of capital stock of \$100, giving the right to 40 inches of water. In the fall of 1890 \$5,700 of stock or receipts had been issued. The original books and papers have been lost, and the proof of these facts is from memory only. The intention of the original incorporators was that the canal should extend a long distance down the valley, and they believed that their rights were very valuable. They were unable to procure the funds necessary to carry out the undertaking. In the fall of 1890 certain negotiations were had between the stockholders and W. H. Wright and two associates. These men were desirous of obtaining the appropriation which it was believed the Farmers Canal Company had acquired, and the right to build a canal taking its water at the same point of diversion. After several meetings, it was finally agreed between those interested in the company and Wright and his associates that in consideration of the payment into the treasury of the company of \$1,000 in cash to be expended in finishing the ten miles of canal already constructed so as to make the water therein available to the landowners interested, and the execution of contracts conveying to the individual stockholders of the company, in proportion to their shares or interests, preferred water rights, the old stockholders would surrender to Wright and his associates their stock

and the control of the company. After a tentative agreement had been made, a form of contract or certificate was agreed upon which was to be issued to the old stockholders. It was also agreed, upon Mr. Wright's suggestion, that, in order to save time, the business be conducted by the old officers until such time as the new parties were ready to make the change. After the agreement was made \$1000 was paid over, and printed contracts according to the form agreed upon were executed and delivered to the respective stockholders, part of them by the old officers, John W. Weeks, president, and C. W. Ford, secretary, and part by the new officers, W. H. Wright, president, and D. D. Johnson, secretary. The money paid in was used upon the canal as agreed and for several years thereafter water was supplied to the owners of these contracts by the company. Soon after the new parties obtained control, they concluded that the nonassessable features of the contracts were void and unenforceable. They served printed notices upon some of the contract holders that, while they would furnish water they did not recognize the validity of these provisions of the contracts. It is shown, however, that, whether the contract holders were served with such notice or not, the company supplied the water free of charge to all stockholders and made no effort to collect any sum for maintenance. In 1896 the company became embarrassed financially, and the water-users were notified that, if they desired water, they would have to look after the ditch themselves. They met, formed an organization, and assessed themselves a sufficient amount each year to pay a ditch-rider who superintended the ditch and apportioned the water among them. The canal company bore no portion of this expense, but gave its consent to use the ditch under this arrangement.

Before this time (but after the plaintiff and others were taking water from the ditch under the contracts) the company executed a trust deed upon all its property and franchises to secure certain bonds. Default being made, the trust deed was in 1901 foreclosed in the circuit court of the

United States. The result of these proceedings was that the property was sold at foreclosure sale and purchased by one Roberts Walker. The sale was made subject to certain specified water-right contracts. In October, 1904, Roberts Walker, the purchaser at the foreclosure sale, acting as trustee for the bondholders, sold and conveyed all the right, title, and interest in the property acquired by such proceedings to the Tri-State Land Company, defendant. The deed contained the clause, "subject, however, to any valid rights under certain water-right contracts issued by the Farmers Canal Company for about two thousand (2000) acres of land to various parties owning land under said ditch or canal." The Tri-State Land Company took possession under this deed, and soon afterwards began to enlarge and extend the canal. In doing this, they took out the plaintiff's headgate in order to widen the ditch, and put in another one, making the inlet so high that afterwards no water flowed through it. Practically the same proceedings were had with respect to the water supply of the other contract holders. The contract holders claim the right to the use of water under the contracts upon land described in their cross-petitions lying under the first ten miles of ditch.

In the answer of the Tri-State Land Company, it insists and claims that it did not purchase the canal subject to these contracts and water rights and is not bound by the terms of the same; that the contracts are void; and that it owns the canal and appropriations unincumbered by any of these water-right contracts. Similar questions were raised, but not decided, in *Clague v. Tri-State Land Co.*, 84 Neb. 499. A number of matters of defense pleaded are not supported by the evidence and it is unnecessary to notice them. At the trial defendant announced, and it was made a part of the record, "the Tri-State Land Company has at all times, and now does, refuse to recognize, as valid and binding upon it, these water contracts, in the form, as drawn, providing for the preferential use of water, without assessments. But the company, * * * at all times and

now, is perfectly willing to recognize the contracts, as valid and binding upon it, so far as the granting of water rights is concerned to each one of these parties, without any charge therefor, but contends that that water right must be without preference and that the holders thereof must pay a reasonable maintenance charge per annum."

It takes a similar position in this court. This concession materially narrows the inquiry, and takes away the necessity of considering a number of the points argued in the defendant's brief. An interesting and elaborate brief has been filed by the defendant containing a summary of the legislation in this state with respect to irrigation. It is argued that, under the statutes of this state, an irrigation company has always been a public service corporation having the right of eminent domain, and that consequently it must serve the public upon equal terms and without preference or discrimination; that the contracts in controversy here, in so far as they interfere with this statutory duty, are *ultra vires* and beyond the power of the corporation to enter into; that it was the intention of the legislature to depart from the principles governing the use of water in the arid states to the west of us; that in these states there were always people and land waiting for water, but that in this state the first settlers were in the eastern portion and knew nothing of irrigation; that the legislature in the passage of the first act in relation to the subject in 1889 intended that a canal should be built in a new country as railroads had been built in a new country, and that settlement would follow the canal as it had followed railroads. On the other hand, the plaintiff claims that by the contract he acquired an easement in the canal for the purpose of conducting the amount of water specified in the contract to his land; that the consumer is the real appropriator from the natural stream and the canal company merely a common carrier of the water.

A number of interesting questions are presented and ably argued in the respective briefs, but it seems to us that the respective rights of the parties in this controversy may

be determined upon broad equitable principles, and that unless an emergency arises, which under the evidence as to the amount of water in the North Platte river and the capacity of the canal may never happen, it is unnecessary to consider or decide many of them at this time.

At the time that the Farmers Canal Company was incorporated, there was no statute in this state providing for the appropriation of water from the public streams of the state. The only statute then in existence was the act of 1877 (laws 1877, p. 168) which provided that corporations organized for irrigation or water-power purposes might acquire right of way necessary "in the same manner as railroad corporations may now acquire right of way for the construction of railroads," and that such canals are declared to be works of internal improvement. In 1889 a complete act (laws 1889, ch. 68) evidently intended to cover the whole subject of irrigation was passed. The transfer of ownership of the Farmers Canal Company from the incorporators to Wright and his associates was made after the passage of the latter act, and the legality of the contracts must be measured by the law as it then stood, subject of course to any limitations subsequently made under the police power of the state. Our attention has not been called to any provisions of the comprehensive statute of 1895 which denounce contracts of the nature of these, and hence we find it unnecessary to consider it, and have endeavored to determine the validity of the contracts under the law existing at the time that they were entered into.

It is an old and well-established principle that equity looks to the substance of things rather than the form. Even in a mandamus proceeding this court has looked at a stock corporation as being *de facto* a mutual irrigation company. *Swanger v. Porter*, 87 Neb. 764. It is clear from the evidence that it was the desire of Mr. Wright and his associates to obtain the advantage, either real or supposed, which the Farmers Canal Company had procured by its prior appropriation of water and of the particular place on the river most suitable as the point of diversion for a

canal intended to extend to a distance of many miles beyond the terminus of that already constructed. There was little inducement for any one not interested as a consumer of water to advance any money for the purpose of completing, or to acquire any interest in, the canal already constructed, unless as an opening for a larger enterprise. The land which the new parties desired to irrigate lay beyond the first ten miles, but the existing headgate, point of diversion, and right to take the water were evidently thought to be of great importance to the new scheme. The original stockholders desired to retain their right to the water to the extent they had acquired it, but they were willing that the canal should be enlarged and the existing right of way over their lands used for the purpose of carrying water beyond them. They might have retained the ownership of their canal and their right to the water appropriated, and yet on payment of an agreed compensation have permitted a new company to have the canal enlarged and to have water appropriated by it carried through the same headgate to a new canal beginning at the terminus of the original canal. A canal and the right to the water therein may be severable into sections. *Canal Co. v. Gordon*, 6 Wall. (U. S.) 561; *Reynolds v. Hosmer*, 51 Cal. 205. We have not been pointed to any statute or legal principle which would render a contract effecting the same purpose, but reaching the result by a different method, unlawful. If such a method as described had been followed, no one would assert consumers lying below the terminus of the first section of the canal and using the appropriation made therefor would be equal in right to the consumers under the original canal. Viewing the whole transaction as it actually was, and not merely with respect to its form, we see nothing illegal in the preservation by the original owners of their existing rights while at the same time permitting the new owners the right of enlargement and extension to reach new fields. *City of South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579; *Orcutt v. Pasadena Land & Water Co.*, 152 Cal. 599.

Are the provisions of the contract exempting the holders from the payment of assessments against public policy and void? Conceding the contention of the appellant that a corporation owning a canal and carrying water for the purpose of irrigation occupies the same position with reference to the public and to water-users as does a railway corporation, we may inquire whether contracts somewhat similar in nature made by railroad corporations are not enforceable. Prior to the passage of the federal and state statutes prohibiting the issuance of free transportation, it was not infrequent that railroad companies in settlement of suits for damages, or in payment for right of way or for services rendered, contracted to deliver to individuals free transportation over the whole or a portion of their lines. *Atchison, T. & S. F. R. Co. v. English*, 38 Kan. 110. We are not aware of any instances prior to the enactment of the statutes referred to wherein such contracts were held invalid as being beyond the power of the railroad companies to enter into. In California, before the adoption of the constitution of 1879, irrigation corporations were at liberty to enter into contracts with reference to the price and use of water upon such terms as might be satisfactory, and whether the contract was well advised or not was not a question for the courts, in the absence of fraud, mistake, or other elements which render ordinary contracts void or voidable. *San Diego Flume Co. v. Souther*, 90 Fed. 164; *Fresno Canal & Irrigation Co. v. Park*, 129 Cal. 437; Wiel, *Water Rights* (2d ed.) sec. 419.

And so in Colorado, in the case of *Grand Valley Irrigation Co. v. Leshner*, 28 Colo. 273, which is very similar in its facts to this case, four landowners organized a corporation and constructed a ditch for the irrigation of their lands. Another corporation was later organized by other parties for the irrigation of a larger tract, diverting the water at the same point on the river. The incorporators of the original company then agreed that, in consideration of the surrender of their franchise to the latter company, they should each receive a certificate to a water right of a

definite number of inches from the ditch of the latter company free from all dues and assessments. The second company mortgaged its property. The mortgage was foreclosed and the ditch purchased by a third corporation. This corporation notified the owners of these certificates that they had no right to receive water free of cost, and threatened to deprive them of the use of water unless they paid the regular assessments thereafter. The action was then brought to quiet the title to the water rights obtained by means of these certificates. The court held that the action was one to quiet title of plaintiff to an alleged easement; that the acknowledgment of the obligation to deliver the specified quantity of water through the ditch was a conveyance in writing of an easement therein; and that, since the defendant purchased the ditch with knowledge of the existence of the certificates and the physical evidence conveyed by the cultivated land, the lateral ditches and the head-gates, they purchased the property subject to the existing easement. The judgment of the district court quieting the title was affirmed. *Hargrave v. Hall*, 3 Ariz. 252; *Wutchumna Water Co. v. Rogel*, 148 Cal. 759; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716.

Whatever the form of the transaction whereby Wright and his associates obtained possession of the property of the original appropriators and the right of way for their proposed canal, in substance it was really an agreement that in exchange for the property the canal company would release these parties from the annual assessments. Suppose that instead of making such contracts they had paid to each stockholder, or to the company for distribution to the individual stockholders in proportion to their shares, a sum of money which placed at interest would furnish an annual fund sufficient to meet the necessary assessments for the upkeep of the ditch, or had agreed in consideration of the transfer to pay a certain sum annually to each stockholder, could such transaction be said to be against public policy, or to be void as discriminatory? The testimony is that the appropriation, the partially constructed ditch,

the headgate, and the right of diversion at that particular point were worth a large amount of money. Practically the only consideration these contract holders received for all their interest in the corporation except their right to water was relief from the annual assessments. The \$5,700 worth of labor and money spent was returned to them in water rights of that value, but nothing was paid for the value of the right to the location or for the appropriation of water in excess of that retained, except the relief from annual charges. What is there in the articles of incorporation or in the statute to prevent the corporation paying for property either by lump sum or by an annual contribution? Relief from an assessment is practically the same as if the company itself paid the necessary sums out of its treasury. We know no reason why either form of payment is not permissible. The immediate effect probably was to relieve the company from the payment of a large sum of money, and at a time when it was not easy to float enterprises of this nature. No consumer of water under the ditch is before the court complaining that by the enforcement of these contracts the necessary charges for his use of the canal will be excessive. The corporation alone complains, and the sole question is whether, after having purchased with notice of the existence of these contracts and with its eyes open, the defendant company can refuse to carry them out on the ground of public policy. This we are satisfied it has no right to do. The case is distinguishable from *Sammons v. Kearney Power & Irrigation Co.*, 77 Neb. 580. The contract considered in that case created a monopoly in the use of water for the generation of electric power, and the light company had no prior right to water.

The question as to the validity of the preference given may prove to be merely academic, but we think it proper to give it some consideration. The contracts are alike in providing that each contract holder shall have water "first in preference over any and all subsequent stockholders in the canal." Sections 12 and 13, act of 1889 (laws 1889, ch.

68), which were in force when the contracts were made, provide:

"Section 12. In case the volume of water in any stream is not sufficient to supply continually the wants for irrigating purposes of the owners or proprietors of land in any district or neighborhood in which customs exist for distributing the waters amongst such owners or proprietors, the waters diverted must in such case be held to be a common right in those accustomed to the participation in the use and enjoyment of such distribution, and such customs must be upheld in all courts as conferring such common right in the same. But this section does not affect any prior vested rights.

"Section 13. In case any person, company or corporation has constructed a ditch for the purpose of diverting the water of any river, creek, canyon, ravine or spring, for the purpose of selling the water thereof for irrigating purposes, the owners or cultivators of said land along the line of and covered by said ditch or canal, are entitled to and have the right to the use of water from said ditch or canal, for the purpose of irrigating said land, so owned or cultivated in the following order: First. All persons through whose land such ditch or canal runs are entitled to the use of the waters thereof in the order of their location along the line of said ditch or canal. Second. After those through whose land the ditch or canal runs, those upon either side of the line of the ditch or canal are entitled to the use of the waters thereof, those equally distant from the line of said ditch or canal are entitled to priority in the order of their location along the line of said ditch or canal; provided, that in times of scarcity of water the same shall be equally distributed to the consumers thereof."

Under these provisions it is plain that the rights of the original stockholders must be held to be a common right by virtue of their own previous custom and agreement, and that their priority, in the absence of any such agreement, would have been in the order of their location along the line of the canal. We must consider the contract holders

equal in priority as against subsequent consumers, whose lands lie beyond the ten miles of the original ditch, but perhaps subject to the statutory requirement that in time of scarcity the water shall be equally distributed. This, however, has not been argued and it is unnecessary to determine.

The argument that the corporation could not grant a perpetual water right we think is not tenable. The right to have the water from the river conveyed to the headgates of the respective contract holders and their assigns is of the nature of an easement in the ditch. This being so, it could be sold and conveyed, and may be granted in perpetuity. It is descendible and devisable, subject, however, to regulation under the police powers of the state, and appurtenant to the land for which it was appropriated or to which it has been applied. *Farmers H. L. C. & R. Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467; *Stanislaus Water Co. v. Bachman*, *supra*. In so holding, however, we must be understood as considering only the nature of the contract and the rights of the contract holders, and not the status of ordinary water users.

In conclusion, we believe the views expressed are in accord with the general principles adopted in the western states. In those states, as in this, a stock corporation formed for the purpose of constructing an irrigation canal, though private as to its manner of organization, is of the nature of a public service corporation. Its rights and duties are modified by the nature of its functions. It cannot serve the public generally, but only the occupiers of land lying under the ditch. Its duties to the respective consumers may be modified and affected by the operation of rights of priority and by the operation of the police powers of the state. *Cummings v. Hyatt*, 54 Neb. 35; *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*, 67 Neb. 377; *Farmers Canal Co. v. Frank*, 72 Neb. 136; Wiel, *Water Rights* (2d ed.) secs. 411, 413, 416; Kinney, *Irrigation*, sec. 307 *et seq.*; Pomeroy (Black's), *Water Rights*, sec. 194; Long, *Irrigation*, sec. 130.

The contention that the state of Nebraska has initiated a different system or adopted different principles with respect to the practice of irrigation we think is unfounded. The customs of settlers upon subarid lands in this state and the statutes enacted by the legislature are in most respects the result of the experience of irrigators in, and of laws upon the statute books of, states lying farther west. In these states the legal principles which have been evolved through the experience of more than half a century have been crystalized into statutes varying in administrative details, but alike in fundamentals. The progress of legislation is still going as practical experience shows the necessity of change—witness the several acts on this subject passed by the legislature of 1911. Laws based upon custom and experience, and not upon *a priori* speculation, are usually the wisest that the statute books contain. We take the view that our Nebraska laws should be interpreted in the light of the experience of others under somewhat similar conditions.

The district court found for the plaintiff and the cross-petitioners, that the contracts were valid, and that the preference right and the right of relief from assessments therein contained were binding on the Tri-State Land Company. The decree seems to allow the contract holders to take water at any point on the ditch, and does not seem to protect and reserve sufficiently the right of the Tri-State Land Company or of the state to regulate the use of the headgates so as to prevent waste of water. The contract holders are not entitled to the use of water to their contract quantity irrespective of a beneficial use.

We think the decree of the district court must be affirmed in the main, but modified so as better to preserve these rights.

AFFIRMED AS MODIFIED.

McDonald v. Thomas County.

JOHN W. McDONALD, APPELLANT, v. THOMAS COUNTY, AP-
PELLEE.

FILED JUNE 13, 1911. No. 16,494.

Judgment: REVIVOR: INTEREST. A judgment, when revived, draws interest at the legal rate from the date of its rendition.

APPEAL from the district court for Thomas county:
JAMES N. PAUL, JUDGE. *Reversed with directions.*

S. L. Geisthardt, for appellant.

John H. Evans, contra.

LETTON, J.

This is an appeal from a judgment reviving certain judgments against Thomas county in favor of appellant, but denying interest after the same became dormant, and taxing the costs to the appellant. The question presented is whether a revived judgment draws interest from the date of the judgment to the time of payment, or whether interest is suspended during the period of dormancy.

A proceeding to revive is not, strictly speaking, an action. It is "a statutory proceeding, not for the purpose of recovering money, but for the purpose of restoring the judgment." *Farak v. First Nat. Bank*, 67 Neb. 468. The first paragraph of the syllabus to *Eaton v. Hasty*, 6 Neb. 419, is as follows: "A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition." The opinion cites and quotes *Irwin v. Nixon's Heirs*, 11 Pa. St. 419, 425. See, also, *Snell v. Rue*, 72 Neb. 571; *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170; *Farak v. First Nat. Bank*, *supra*. The effect of the revivor is to establish the original judgment in full force, with the same incidents as it originally had, except

as to its effect as creating or continuing a lien upon the property of the judgment debtor.

At common law interest was not recoverable upon *scire facias*. *Hall v. Hall*, 8 Vt. 156; *Berryhill v. Wells*, 5 Bin. (Pa.) 56. The statute governing interest on judgments is as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid." Comp. St. 1909, ch. 44, sec. 3 (Ann. St. 1909, sec. 6752). This language is plain and unambiguous. Since the revivor merely reinstates an original judgment, we can see no reason why the statute is not equally as applicable to a judgment when revived as when it was originally rendered. The judgment amounts to a contract of record to pay the debt evidenced thereby with interest, and, while the failure to issue an execution for five years deprives it of validity as a lien, it does not affect the contract. An action could be brought upon it the same as if not dormant, and the full amount with interest recovered. *Snell v. Rue*, *supra*. The remedy provided by an execution has been suspended, but the date of its rendition remains the same. *Thornhill v. Hargreaves*, 76 Neb. 582, 590; *White v. Ress*, 80 Neb. 749. If the judgment debtor desired to stop the accrual of interest, it was within its power to do so at any time.

As to the matter of costs: The defendant resisted the revivor proceedings in the district court. Having put the plaintiff to the trouble and expense of a contest, he was entitled to recover costs.

The judgment of the district court is reversed and the cause remanded, with directions to render a judgment allowing interest upon the revived judgments from the date of their rendition, and taxing the costs to defendant.

REVERSED.

ROSS P. CURTICE COMPANY, APPELLEE, v
ADMINISTRATOR, APPELLANT.

FILED JUNE 13, 1911. No. 16,496.

1. **Infants: CONTRACTS: DISAFFIRMANCE.** When an infant enters into a conditional sale contract, the parties stand in relation to each other and to the property sold as they would in the case of a disaffirmance of an ordinary sale. The property bought by the infant remains in the vendor's hands, and the right to recover partial payments made, if any, is lost. If a minor disaffirms a contract, the right to recover partial payments made, if any, is lost.
2. **—: —: —.** Where an action is brought by an infant to recover property sold to an infant, and infancy and infancy are pleaded, the right to recover the property and the right to be repaid what he claims he has paid for the property may both be tried in the same action.

APPEAL from the district court for
JAMES R. HANNA, JUDGE. *Affirmed in part
in part.*

Arthur G. Abbott, for appellant.

Fred W. Ashton, contra.

LETTON, J.

This is an action in replevin brought to recover a piano sold to defendant by plaintiff for \$300 under a conditional sale contract whereby the title to the instrument was retained by the seller until it was fully paid. Plaintiff was a minor 17 years of age at the time of the sale and made default in certain monthly payments. An action was brought to obtain possession of the piano. Taken under the writ and delivered to plaintiff, defendant pleaded infancy, that he had paid \$100 for the piano, no part of which had been tendered or returned, and prayed for a return of the piano or for a judgment for the amount paid by him with interest. The case was tried by the court without a jury. The finding and

for the plaintiff, with a further finding that the plea of payment of \$106 made by defendant is not a triable issue in the case. From this judgment defendant has appealed.

There is no dispute as to the facts. The only question presented is whether the plaintiff was entitled to retake the piano without returning the amount paid upon the contract. The plaintiff, while conceding that an infant may repudiate a contract respecting personal property during his minority, and that the disaffirmance completely puts an end to its existence both as to him and as to the adult with whom he contracted, and that, before an infant disaffirming a contract can recover property from an adult, he must return what he has received under the contract, argues that, under the rule announced in *Schrandt v. Young*, 62 Neb. 254, the gist of an action in replevin is the right of possession, and the only damages that may be recovered are those arising from the unlawful detention, and insists that the district court properly held that the question of refunding the money paid cannot be determined in this action.

The plaintiff began this action relying upon the conditional contract. After it was begun the infant disaffirmed the contract, and by the act of disaffirmance effectually took away from the plaintiff any right it was then asserting thereunder. The parties then stood exactly in the same position with respect to the piano and the partial payments made thereon as if no conditional contract had ever existed. The contract being set aside by the disaffirmance, plaintiff, still being the owner of the piano, was in the same position as it would have been had it begun the action upon the rescission of an ordinary contract of sale. In such case, would it be permitted to obtain possession of the property in the infant's hands without returning the consideration paid? We think not. The rule is that one who in his minority obtained property which is still in his hands cannot after majority disaffirm and recover the property which he conveyed in exchange for it, unless he offer to return that which he has,

and thus place matters as nearly as may be *in statu quo*. *Englebert v. Troxell*, 40 Neb. 195, 26 L. R. A. 177, and note; *Jones v. Valentine's School of Telegraphy*, 122 Wis. 318; *Corey v. Burton*, 32 Mich. 30; Rodgers, Domestic Relations, sec. 683; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. n. s. 128. The rule applies with greater force to an adult, especially if he seeks to take property by legal process from an infant. *Wagman v. Kessler & Co.*, 78 Neb. 263; *Baker v. McDonald*, 74 Neb. 595; *Tootle v. First Nat. Bank*, 34 Neb. 863. The plaintiff had no right after the disaffirmance to recover the property from the infant without tendering back the money it had received as a condition to recovery. Since the infant by his answer virtually conceded the right of plaintiff to recover the piano if a judgment for the money paid were rendered in his favor, we think the court would have been justified in treating the answer as being of the nature of a counterclaim, and in finding against plaintiff for the money paid and rendering judgment accordingly. The writer had some doubts as to whether a counterclaim for money could be set up in a possessory action, even under the liberal provisions of the code, but finds that such is not an unusual practice, and that it has received the sanction of other courts. It tends to the directness and certainty so much to be desired in legal proceedings, and does away with needless delay and circuitry of action.

In an action to compel the delivery of certain bills of lading of goods and to restrain defendants from departing with the goods or from interfering with the merchandise which they represented, it was held in New York that a counterclaim for the price of the identical goods which were the subject of the action was a cause of action "arising out of the transaction," or at least "connected with the subject of the action," and is strictly a counterclaim within the provision of the code. *Thompson v. Kessel*, 30 N. Y. 383.

Where a horse was exchanged for land, and, it having returned to the possession of the original owner, an ac-

tion in detinue was brought for its possession, the defense that certain false representations had been made in order to induce the original transaction and asking to have the contract of exchange rescinded was held to be properly allowable as a counterclaim. *Walsh v. Hall*, 66 N. Car. 233.

Mr. Pomeroy says, in Code Remedies (4th ed.) sec. *791: "The practical question therefore is: When, if ever, may there be a counterclaim of money in an action brought to recover possession of chattels? In some exceptional cases such counterclaims have been allowed, and in my opinion properly allowed. For example, an answer stating the circumstances under which the goods demanded by the action came into the defendant's possession, that the plaintiff was indebted to him in a specified amount, that the chattels were delivered to him as a security for such debt, and that he held them by virtue of the lien thus created by the pledge, and demanding judgment for the debt itself, was adjudged a proper counterclaim." See, on general subject, 34 Cyc. 686; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun (N. Y.) 49; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Smith v. Fife*, 2 Neb. 10.

The claim made is one "existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim," and it is "connected with the subject of the action." It falls, therefore, directly under the provision of section 101 of the code. The principle is clearly distinguishable from that in *Schrandt v. Young*, *supra*, on which plaintiff relies.

We think the district court had the authority under the issues to determine whether defendant was entitled to the return of the money paid, and that its judgment should have been in favor of the plaintiff for the recovery of the piano upon its paying the amount the plaintiff had paid thereon, but without interest, since the use of the piano

would offset the use of the money. It was the duty of the court to protect the infant, and, if the guardian *ad litem* had not disaffirmed for him, the court would no doubt have directed it to be done. This being so, and the defendant disclaiming title to the piano, the costs should follow the judgment against the plaintiff for the money paid. The result seems hardly just to the plaintiff, but persons dealing with infants do so at their peril. The law is plain as to their disability to contract, and safety lies in refusing to transact business with them.

The judgment of the district court for the possession of the piano is affirmed, but that portion of the judgment denying defendant the right to try the issue as to the money paid is reversed and the cause remanded for further proceedings in accordance with this opinion; appellant to recover costs.

JUDGMENT ACCORDINGLY.

SEDGWICK, J. concurring.

I think that, under the evidence in this case, the defendant had a special interest in the property to the amount which he had paid to the plaintiff therefor. There seems to be no doubt that the infant could disaffirm his contract of purchase, and if his vendor should elect to take the property it could only be on condition of returning to the infant the amount which had been paid under the contract. The case then falls within sections 191 and 191a of the code. The finding should have been for the defendant, that he had the right of possession only and that the value of his possession was the amount which he had paid upon the contract before he disaffirmed. Then the judgment should have been in the alternative, either that the possession be returned to the defendant or that he be paid the "value of the possession of the same," as provided in section 191a. It does not seem strange that the trial court was misled by the opinion in *Schrandt v. Young*, 62 Neb. 254. In the whole learned discussion in that case it would seem that the fact that the defendant had a special interest in

the property by virtue of his contract was overlooked. It is said in the opinion that damages "may not be recovered except where there is a return." This is true where the defendant is found to be the general owner of the property, but it is not true when the defendant is found to have a special interest in the property. In such case, by section 191a of the code he is to have either a return of the property or payment of the amount of his special interest in it together with his damages, and his damages in such case would ordinarily be interest on the amount of his claim. It would seem that if the contract under which the defendant held possession of the property at the time the replevin action was begun was of such a nature that the defendant's damages could not be ascertained in an action of replevin, then replevin was not the proper remedy and the plaintiff should have been defeated for that reason. In such case the plaintiff should by an action in equity or some proper proceeding have the rights of the respective parties in the property determined. In other words, if the right of possession depended upon equitable considerations that could not be adjusted in an action at law, replevin would not be the proper remedy, and such action could not be maintained by the plaintiff. In the case at bar there seems to be no difficulty of this kind. The minor was not bound by his contract, but he could not retain the property he had received under it and at the same time disaffirm the contract. The plaintiff therefore might return the money which he had received from the minor and retake the property. Upon the disaffirmance of the contract the minor had an interest in the property to the amount of the advance thereon, so that it seems to me the action comes directly within the provisions of sections 191, 191a of the code.

FAWOETT, J., concurs.

OMAHA CATTLE LOAN COMPANY, APPEALER
C. SHELLEY ET AL., APPEE

FILED JUNE 13, 1911. No. 1

1. **Fraudulent Conveyances: HUSBAND AND WIFE.** Where a husband purchases real estate and causes the title to be taken in the name of his wife, the law implies a gift from husband to wife. In such a case, where the evidence proves that the husband at the time engaged in a hazardous business in the face of a condition of doubtful solvency whose debts he had guaranteed, that the gift was of no great value, that it was not worth, and that he subsequently controlled the property, and under cover of the name of another person disposed of the proceeds of the sale of that real estate, that he transferred the proceeds of the sale of that real estate to himself, which he controlled as his own, that he applied the same to the payment of his debts in exchange for the property transferred, or the transfer of title to his wife or which he was receiving, and so on, and so forth, is a fraudulent conveyance.
2. **Limitation of Actions: CREDITORS' SUIT.** The limitations will not run against an action on a creditor's bill, until the creditor's demand is due, or until judgment.
3. **Creditors' Suit: JUDGMENT AS EVIDENCE.** In an action on a creditor's bill to set aside an alleged fraudulent conveyance, so as to subject the property levied upon to the judgment recovered by the plaintiff against the debtor, if regular on its face, is prima facie evidence of the validity and amount of the creditor's demand, and the debtor, if not a party or privy to the judgment, cannot, by proof, establish any just defense, in part or in whole, which the judgment debtor might have in an action on a judgment.
4. **Corporations: ESTOPPEL.** A person transacting business for many years with an organization claiming to be a corporation, and recognizing it as a corporation, and in enforcing a demand arising out of such business, cannot be heard to question the corporate capacity of the corporation.

APPEAL from the district court for the county of Douglas.
WILLIAM A. REDICK, JUDGE. *Reverse*

W. A. Corson, for appellant.

McCoy & Olmstead, contra.

ROOT, J.

This is a creditor's bill prosecuted for the purpose of subjecting certain real estate in Douglas county to a judgment for \$15,128.52, recovered September 30, 1907, by the plaintiff, as assignee of the Union Stock-Yards National Bank, against Thomas C. Shelly. The defendants prevailed in the district court, and the plaintiff appeals.

Omaha Cattle Loan Company is the plaintiff, and Thomas C. Shelly, his wife, Mattie E. Shelly, Chambers Academy Company, Williard E. Chambers and Ora P. Chambers are the defendants. The inquiry covers a wide range, and involves a consideration of the business transactions of several individuals, firms and corporations. The narrative cannot be other than extended, and, at best, many facts testified to must be omitted, while others that are immaterial, except as they seem to cast some light upon the motives of the principal defendants, should be stated. We have been materially assisted by the briefs, which evidence counsels' painstaking consideration of the evidence, although an occasional reference is made to facts not appearing in the record as we understand it.

In 1888 the defendant Thomas C. Shelly, while the owner of property worth from \$20,000 to \$30,000 became a resident of Douglas county, and engaged in the purchase and sale of live stock upon commission at the stock-yards in South Omaha. Prior to 1892 Shelly was a member of two different firms and furnished the greater part of the capital used in their business. In 1892 Shelly formed a partnership with Messrs. Blanchard and Rogers and continued in the commission business. All of these firms loaned money to live stock men, but this branch of the business was largely increased by the firm of Blanchard, Shelly & Rogers. The loans were evidenced by negotiable promi-

issory notes, bearing interest at the rate of from 7 to 10 per cent. per annum, secured by chattel mortgages which provided that the live stock should be shipped to the mortgagees to be sold on commission. These notes were discounted by the payee at various banks and financial institutions and the proceeds reloaned. In 1894 branch offices were opened and maintained in Denver and Kansas City. In 1898 the Blanchards withdrew from the firm, took over its business at Kansas City, and Mr. Shelly formed a partnership with Mr. Rogers, which continued until January 2, 1899, upon which date the corporation of Shelly-Rogers Company was formed, and it succeeded to the assets and the business of the partnership of Shelly & Rogers. The capital stock of the corporation, \$50,000, was issued and delivered to the Messrs. Shelly and Rogers in consideration for the partnership's assets. Subsequently Shelly purchased from Rogers 75 shares of the capital stock, and, as we understand the record, paid him out of the corporation's assets. In May, 1903, Shelly-Rogers Company ceased transacting business. Out of its bills receivable notes of the face value of \$117,561.16, indorsed by it as collateral security for money borrowed on the corporation's notes, proved worthless, and \$32,676.48 of its paper negotiated and sold to the plaintiff could not be collected. Thomas C. Shelly contends, and there is an entry in a leaf cut out of the corporation's general ledger which may prove, that the corporation was also indebted to him in the sum of \$20,704.26. The evidence does not prove that any other discounted Shelly-Rogers Company's paper could not be collected. So, therefore, giving the corporation the benefit of the presumption arising from this fact, when it ceased transacting business it owed about \$67,000 it could not pay, and, after other creditors were satisfied, held about \$118,000 of worthless commercial paper, some dating back to the days of Blanchard, Shelly & Rogers. In a little more than three years subsequent to this failure, the defendant Mattie E. Shelly and her relatives controlled and received the rents and profits from a dancing

academy located at the northeast corner of Twenty-fifth and Farnam streets in the city of Omaha, and from a three-story flat building, both constructed on the west one-half of lots 10 and 11, block 1, Henry & Shelton's addition to Omaha; and a valuable property in Douglas county, described as the "West Dodge street home," being the south 600 feet of the east 250 feet of the northeast corner of the northwest quarter of section 24, township 15 north, of range 12 east, except a part of Dodge street and a 33-foot strip on the east side for a road. Mrs. Shelly also has the legal title to the west 46 feet of lots 25 and 26, in block 8, Hanscom Place, an addition to Omaha. The legal title to the dancing academy and the flat property is in the Chambers Academy Company, which the defendants insist is, and the plaintiff contends is not, a corporation.

It is difficult to correctly state, within the limits of an opinion, the contentions of the respective litigants concerning the source from whence came the money to purchase and improve the real estate involved in this action and to outline their arguments to sustain those contentions. As we understand the record and the arguments, the defendants contend that Thomas C. Shelly, while solvent, made gifts to his wife of property which culminated in what is described as the "Thirty-second avenue property," lots 25 and 26, block 8, Hanscom Place; that, about the time Shelly-Rogers Company failed, and subsequent to that event, all of this property, other than the west 46 feet thereof, was converted into cash and used in connection with money borrowed from Mr. Shelly's mother and money borrowed from his sister to purchase and improve the lot upon which the dancing academy and the flats were constructed; that Willard E. Chambers, Mrs. Shelly, and a Mr. Hawk, Thomas C. Shelly's brother-in-law, furnished the money to promote the Chambers Academy Company; that this money and money borrowed upon, and the rents and profits arising out of, the real estate created the fund out of which all of these improvements were paid for.

Finally, the defendants say that the plaintiff's claim was created in November, 1902, and, since Mrs. Shelly received no presents from her husband subsequent to February, 1900, the plaintiff is without standing to question the transactions.

The plaintiff contends that the debt evidenced by its judgment had its inception as long ago as 1899; that Mrs. Shelly has at all times held the property she now claims as her own for the benefit of her husband; that Captain Hawk invested no money in the Chambers Academy, but that large sums of money, fraudulently withdrawn by Thomas C. Shelly from the assets of Shelly-Rogers Company, are invested therein; that the firm of Shelly & Rogers was bankrupt in January, 1899, when it transferred its assets to the corporation Shelly-Rogers Company, which was formed by Shelly and Rogers for the fraudulent purpose of avoiding personal liability on the indorsements of the commercial paper in which they dealt, and that the corporation at no time was a solvent concern; that the Chambers Academy Company was incorporated in furtherance of the fraudulent design conceived by Shelly when he incorporated the Shelly-Rogers Company, and that the property described in this opinion should be sold to satisfy the plaintiff's judgment.

As we have said, the evidence discloses that Shelly was worth at least \$20,000 in 1888. We find little, if any, evidence to prove whether Shelly prospered prior to entering the firm of Blanchard, Shelly & Rogers in 1892. Shelly testified, in substance, that the profits of this firm aggregated \$114,000 during the six years it transacted business. He does not say whether he deducted from the ostensible assets the uncollectible commercial paper accumulated by the firm during that time, but says that when the firm dissolved no money was paid to any of its members. Probably they divided the commercial paper in their possession. Thousands of dollars par value of this paper was uncollected and uncollectible in 1903 when Shelly-Rogers Company failed.

Messrs. Shelly and Rogers testified, in substance, that the firm's assets which were taken over by the corporation in 1899 were worth \$80,000. The capital stock of the corporation was \$50,000, so that it had an apparent surplus of \$30,000. The day the articles of incorporation were signed there was a balance of \$20,000 to the firm's credit at the bank where it maintained a general account; but there is no proof that this money was not the proceeds of the sale of cattle consigned to the firm and upon which it had no lien. The general tenor of the testimony of Shelly, of his brother Clarke, who became a member of the corporation and made many of the entries in its books, and of Rogers satisfies us that the firm's assets were represented by the promissory notes turned over to the corporation, the goodwill of the firm, and its tangible property, which consisted of office furniture and saddle horses. Over \$66,000 of the par value of the assets of Shelly & Rogers, as shown by such of the firm's books as were preserved, were charged to the corporation's profit and loss account or were assigned by it as collateral in the fall of 1902 and later found to be valueless. The members of the firm were also liable as indorsers on a vast amount of commercial paper at the time Shelly and Rogers signed the articles of incorporation. The testimony discloses that Shelly & Rogers transacted a business of from \$3,000,000 to \$5,000,000 a year in commercial paper which matured in from three months to six months from its date. At the time the corporation failed, \$700,000 of its rediscounts was outstanding, so that it seems reasonable to say that in 1899, when the firm incorporated, its members were liable on their indorsements for at least that sum. That liability was not conditional, but direct.

Thomas C. Shelly, his brother Clarke and Mr. Rogers testify that none of this paper was in existence when the corporation failed, but we are of opinion that the record discloses that the debts represented by many thousands of dollars par value of those notes had not been paid in May, 1903. Thomas C. Shelly was the guiding and controlling

Omaha Cattle Loan Co. v. Shelly.

force in the firm of Shelly & Rogers and in the corporation of Shelly-Rogers Company. A record was made in discount registers of the pertinent facts connected with the notes acquired by the firm or by the corporation. Not all of these books have been preserved, but a history of many of the notes is recorded in the books in evidence in this case. Shelly sold his firm's and the corporation's paper to four customers in South Omaha, two customers in Fremont, Nebraska, one customer in Mendota, Illinois, one in Rockford, Illinois, one in LaSalle, Illinois, and some of the notes were negotiated by note brokers in Omaha. All of this paper was secured, or was supposed to be secured, by chattel mortgages upon live stock. At times the firm borrowed large sums of money on its notes, and subsequently the corporation borrowed money upon its notes. If the notes taken by Shelly & Rogers or Shelly-Rogers Company were not paid at maturity, they would take a renewal note, attach it to the original bill, and discount them to some customer who had not held the original instrument. By this course of business the corporation, until November 1902, maintained sufficient credit at the banks where it transacted business to take up at maturity every note negotiated by the firm or by the corporation. Within four months after the corporation was formed, to be exact April 25, 1899, two of its regular customers demanded and secured a personal guarantee from Thomas C. Shelly and Mr. Rogers of those creditors' demands, present or future, against the corporation, and on December 28, 1900, the plaintiff's assignor, the Union Stock-Yards National Bank, was also given a like guarantee to the extent of \$25,000. November 25, 1902, Thomas C. Shelly called into conference representatives of three of Shelly-Rogers Company's principal corporate customers and one individual investor, and stated to them that he or Shelly-Rogers Company had misappropriated \$50,000 of the proceeds of sales of cattle mortgaged to secure notes held by these customers, and that the corporation had suffered a loss of over \$30,000 by reason of the conduct of a broker to whom they had de-

Omaha Cattle Loan Co. v. Shelly.

livered that amount of their paper duly indorsed, which he had sold, but had embezzled the proceeds. This broker died September 30, 1902, from a gunshot wound. Shelly stated that, if funds were advanced to tide the corporation over its financial difficulties, it would earn sufficient money within a few months to place it in good financial condition; whereupon the Union Stock-Yards National Bank accepted the note of Shelly-Rogers Company for \$20,000, gave it credit on its books for that sum, and subsequently loaned Shelly-Rogers Company \$13,000 more money. Other of the creditors accepted the corporation's notes, secured by collateral, to balance the misappropriated money to which they were entitled.

At this time a suit involving the right to the proceeds of the sale of a herd of cattle was pending between the Union Stock-Yards National Bank and Shelly-Rogers Company, and as a result of this conference the suit was dismissed. A supplemental contract for further support was made between the bank and Shelly-Rogers Company; but, an investigation having developed that in many cases the livestock mortgaged to secure the collateral put up to secure the borrowed money had been sold by Shelly-Rogers Company, the bank refused to advance more money, and Shelly-Rogers Company assigned what Shelly contends was all of its assets to the bank and went out of business May 2, 1903. A new commission firm succeeded to its business, and for a time the books and records of Shelly & Rogers and Shelly-Rogers Company were preserved and stored in the old office; but subsequently the sales books, the cash books, the ledger containing the trial balances, and the general ledger, with the exception of 12 leaves, were burned. It also seems probable that at least one discount register was destroyed. McCrea, a relative of Shelly's, kept books for Shelly-Rogers Company, and retained the same position under its successor in business. He telephoned Shelly that the new commission firm intended to burn the books and records, and at Shelly's request cut from the general ledger the 12 leaves which

exhibit the state of Shelly's personal account for about three months prior to the close of the corporation's business, one month's account of bills receivable, about nine months' record of the account of undivided profits, two months' record of the commission account, of the discount account, the interest account, Rogers' personal account, the expense account, and the account with the Union Stock-Yards National Bank. Some other minor accounts are also shown for a period covering three months prior to the failure. Shelly made no effort to prevent the destruction of the books and records. His counsel contend, however, that, since the records were delivered to the individual selected by the creditors to collect the assets of the corporation, Shelly had no control over the records, and is no more chargeable with their destruction than is the bank. Shelly seems to have been the only interested person to receive notice that the records were about to be destroyed, and there certainly is no presumption in his favor by reason of the fact that he selected and preserved so small a part of them and by his silence acquiesced in the destruction of evidence to establish the financial condition of the corporation and of the firm to whose business it succeeded. During all of the years Shelly & Rogers and Shelly-Rogers Company were in business, Thomas C. Shelly had no personal bank account, but transacted his private business through the firm, and later through the corporation. The Shellys both testify that Thomas C. Shelly at times deposited large sums of money with the firm or corporation to his personal credit, and that all of his disbursements on account of his private business and personal expenses were made by checks of the firm or of the corporation upon its bank account.

An examination of the records preserved and in evidence casts some doubt upon Shelly's contention that Mr. Voss, the note broker, was indebted to Shelly-Rogers Company at the time of his death. More than a month passed after the event before Shelly advanced that contention to his creditors, and the entries in the records before us show

Omaha Cattle Loan Co. v. Shelly.

that in the other transactions had with Shelly-Rogers Company, aggregating over \$300,000 in amount and covering at least a year of time, Voss delivered his check for the notes at the time he received them from the corporation, and whenever he returned a note Shelly-Rogers Company gave him its check or other notes of equal value therefor. Voss gave Shelly-Rogers Company his check for a note purchased from it by him the day of his death. The check was not paid because presented subsequent to the drawer's death. No satisfactory reason is given for Shelly-Rogers Company demanding, and Voss giving, his check for this note while he held \$30,000 of the corporation's paper for which he had not paid. Mr. Shelly's explanation that this condition was permitted to exist because the corporation did not need the money does not appeal to us as reasonable, in the light of the fact that the corporation at that time had misappropriated thousands of dollars of trust funds received by it from the sale of mortgaged cattle, which it should have paid, but did not pay and did not have the money wherewith to pay the rightful owners. The Day note included in the list of paper alleged to have been embezzled by Voss was, according to the entries in the Shelly-Rogers Company books, preserved and in evidence, paid for by Voss January 29, 1902, the day it was delivered to him, and on August 12, 1902, the day it matured, was satisfied by the corporation. A renewal note taken by Shelly-Rogers Company was sold to another party, who paid Shelly-Rogers Company therefor. The evidence also proves other facts tending strongly to discredit Mr. Shelly's contention that his corporation lost any money by reason of any act on the part of Mr. Voss. It is true that the deceased broker's legal representatives paid his creditors the proceeds of his life insurance policies, and the creditors of Shelly-Rogers Company received from that source about \$7,500. It does not seem probable that payment would have been made upon a bogus claim; but it is also improbable that the evidence before us was accessible in the county court when the assignee of the

corporation made his proof in the Voss estate, which was made in good faith. The evidence on this branch of the case tends strongly to prove the insolvency of the corporation and the real ownership of the property in dispute.

December 13, 1889, Thomas C. Shelly acquired title to a part of lot 1, Coburn's subdivision of block 11, West Omaha, and subsequently resided thereon. In May, 1894, he traded this tract for lot 5, block 5, Hanscom Place, addition to Omaha, a vacant lot, and the title was taken in his wife's name. This lot was mortgaged and a residence erected thereon, which the Shellys occupied as their home. The defendants' counsel argue that the money secured by this mortgage was invested by Mr. Shelly in the commission business for the benefit of his wife and earned her 10 per cent. annual interest; but Mrs. Shelly testifies that this money was used to pay for the house. April 25, 1899, the day that Shelly gave the South Omaha National Bank and the Cattle Feeder's Loan Company, two of Shelly-Rogers Company's customers, his unlimited personal guarantee of their demands, present and future, against the Shelly-Rogers Company, Thomas C. Shelly paid the mortgage last referred to. May 8, 1899, this property was sold for \$7,500, and the money subsequently was used by Shelly in Shelly-Rogers Company's business. Both Mr. and Mrs. Shelly say that he held this money in trust for her; but there is no other evidence to this effect. The cash book and ledger of the Shelly-Rogers Company covering this period were not preserved, nor does any witness testify that a credit was given Mrs. Shelly in any book of the company for that sum or for any other amount. From all of the evidence upon this point, we strongly incline to the opinion that the title to this property was taken in Mrs. Shelly's name as a matter of convenience; that when the real estate was sold Mr. Shelly used as his own the money acquired thereby, and that Mrs. Shelly did not question his right to do so. July 27, 1898, Shelly purchased lot 20, block 5, Hanscom Place, subsequently built a house thereon, and sold the property February 27, 1900, for \$4,750.

Omaha Cattle Loan Co. v. Shelly.

Mrs. Shelly testify that this house was built for daughter; but the gift was never consummated, and property should be treated as Shelly's. February 27, Shelly purchased lots 25 and 26 in block 8, Hanscom took the title in his wife's name, and subsequently erected a valuable house upon the premises, which they made as their home. The total investment in this property about \$16,000. A building permit for this house is in C. Shelly's name; he employed the architect, paid all of the bills by checks on the account of Shelly-Company, and his subsequent control of the property purchased from the money secured by mortgaging this estate and by a subsequent sale of the greater part tends strongly to prove that he was the real owner. December, 1902, the defendant Willard E. Chambers, and defendant Ora P. Chambers, the daughter of C. and Mattie E. Shelly, were married. Mr. Chambers is an adept dancing master, and was then, and is now engaged in that vocation. The evidence tends to prove that Mr. Chambers at this time had little, if any, of this world's goods other than his personal effects. The evidence also proves that Mr. and Mrs. Shelly, anticipating the failure of Shelly-Rogers Company, discussed with their son-in-law the advisability of constructing and opening a dancing academy in Omaha, and in the early April, 1903, took into their confidence upon this Mr. Shelly's brother-in-law, Captain Hawk, a resident of Sacramento, California, who was temporarily in Omaha. May 1, 1903, a mortgage was executed on lots 25 and 26 in block 8, Hanscom Place, for \$6,000, and after the mortgage commission was deducted Mrs. Shelly received from the bank a check for \$5,745.85. This check was taken to the Commercial National Bank of Omaha, where Mrs. Shelly had recently opened a general account, and exchanged for a cashier's check payable to her order: She signed and delivered the check to Mr. Chambers. The next day he took the check to the First National Bank of Omaha, Bluffs, Iowa, exchanged it for a demand certifi-

Omaha Cattle Loan Co. v. Shelly.

cate of deposit payable to his order, and immediately returned to Omaha. May 23, 1903, Chambers delivered the certificate, \$2,450 in currency, and a check for \$150 to Mr. Pritchett, from whom he purchased for \$9,000 the lots upon which the academy and the flats were subsequently erected. We are satisfied that Chambers furnished but \$720 of the money invested in this land. July 17, 1903, Mr. Chambers, his wife, his father, and his unmarried sister signed articles incorporating the defendant Chambers Academy Company, subsequently gave the notice required by law, and filed a copy of the articles with the secretary of state. Neither the elder Chambers nor his daughter invested any money in the corporation, but a share of stock was issued to the father. The capital stock was fixed at \$30,000, of which \$25,000 should be paid before the corporation could transact business; 62 shares were issued to Mrs. Shelly, 63 shares to E. L. Hawk, 62 shares to Ora P. Chambers, 62 shares to Willard E. Chambers, and 1 share to L. P. Chambers. This share was subsequently transferred to Thomas C. Shelly, but at all times he was in complete control of the corporation. Willard E. and Ora P. Chambers gave their several notes to the corporation for \$5,840 for the unpaid purchase price of their stock, and the day it was issued assigned the stock as security for the payment of the notes. Subsequently the corporation borrowed on the security of its property an amount equal to these notes to pay the contractor for constructing the building and to equip it. Chambers and his wife promised the corporation to pay the borrowed money, and their notes were canceled and returned to them. Thereafter Willard E. Chambers became involved, and all but one share of his stock was canceled. This stock was issued to Mrs. Shelly.

Mr. Hawk testifies, in substance, that between the early part of April and the month of August, in 1903, he transmitted to the Shellys in Omaha, by drafts or checks, \$6,300 for investment in the corporation. Hawk could not state the amount of any remittance or the date it was sent. He

had no book account or letters suggesting that any money had been remitted. He had no bank account and could not tell the source from whence the money came, except that it probably represented money paid for fruit grown upon his ranches and a check drawn on a bank in Butte, Montana. Mr. Hawk did not name the county where his ranches were situated, and it seems highly improbable that, if he were receiving an income of \$5,000 per annum from this property and owned property worth \$45,000, he would have no bank account. The Shellys did not produce any letters from Hawk referring to remittances from him, nor were they much more definite than was Hawk concerning the details of this transaction, except that Mrs. Shelly says the money given by her to Chambers, in addition to the proceeds of the loan upon her house, for the purpose of purchasing the academy lots, was sent by Hawk, and that she thinks she received one check or draft for \$1,000 and another for \$2,000 in April or May of 1903. In the corporation's books Hawk is given credit for \$6,300 under date of July 13, 1903. We cannot accept the evidence produced as proof that Hawk invested any money in the corporation; he certainly could have given more of the details of a transaction involving nearly one-seventh of his entire estate if it be of the value testified to by him. Stubs of the checks issued by the corporation to pay the dividends declared in 1906 and in later years purport to evidence checks to Hawk; but the checks were drawn to the order of Thomas C. Shelly or to the order of Mattie E. Shelly, and in the latter event were indorsed by Thomas C. Shelly or Mattie E. Shelly by Thomas C. Shelly, and all of the proceeds of these checks passed under the control of Thomas C. Shelly, although they went into Mrs. Shelly's bank account. The Shelly book account from May, 1903, is in the name of Mattie E. Shelly, but many of the checks drawn thereon, aggregating thousands of dollars, were signed by Thomas C. Shelly.

The academy building did not cover all of the lot purchased from Pritchett, and in 1904 Shelly built a three-

story flat thereon. In 1904 Mrs. Shelly sold to Dr. Davis the greater part of lots 25 and 26, block 8, Hanscom Place. She only appears in this deal as the grantor. Mr. Shelly attended to the transaction and executed a bond to the grantee to secure him against an incumbrance which caused some difficulty between the parties. Dr. Davis paid, all told, about \$9,700, and this money was invested in the flats. Subsequent to July 13, 1903, the date Hawk was given credit for the \$6,300 which the Shellys testified was invested in the academy building, and prior to the time Dr. Davis paid any money to Mrs. Shelly, she deposited \$2,200 in the Commercial National Bank. No satisfactory explanation is given of the source of this fund, and it is not improbable that some of it represented the assets of Shelly-Rogers Company. In the latter part of 1906 the Shellys acquired a tract of land on West Dodge street, and in 1907 a commodious residence was constructed thereon at a cost of about \$6,000. The title to this tract is in Mrs Shelly's name. The property was paid for in part by the proceeds of a loan negotiated by Mrs. Shelly, and secured by a mortgage on the property, and in part from the income arising from the academy property.

At one stage of the trial Mr. Shelly testified, in substance, that the Chambers Academy Company did not keep a cash book for some time after its organization, but cut-out leaves of its cash account were produced. The entries therein do not correspond to the undisputed facts established by other evidence, and were made, as we believe, for the purpose of confusing the reader as to the source of the money paid, for the benefit of the corporation. Mr. Chambers testifies positively that the \$9,000 paid Pritchett for the lot was the only money paid in prior to the time the first loan was negotiated, which, if true, eliminates the \$6,300 credited to Hawk, because the evidence discloses that all but \$720 of this money was furnished by Mrs. Shelly, and the first loan was negotiated by the corporation July 14, 1903, although the first

Omaha Cattle Loan Co. v. Shelly.

entry charging cash with the proceeds of a loan appears under date of September 8, 1903. Had Hawk paid \$6,300 on or before July 13, 1903, according to the entries in this account, the academy company would have had a much greater balance after Pritchett was paid for the lot than its books disclose. The record exemplifies the difficulty experienced in dovetailing fiction with facts, and especially when the facts principally relate to dates and to figures.

We are of opinion that, when Shelly in 1900 purchased the Thirty-second avenue property and had the title placed in his wife's name, and when subsequently he expended about \$8,000 in constructing improvements thereon, Shelly-Rogers Company was not only probably insolvent, but most of its assets were safe from execution. This we say in the face of the fact that chattel mortgages were taken up on live stock to secure payment of the notes payable to Shelly-Rogers Company, and inspectors in the corporation's employ were constantly inspecting and trying to keep in touch with the mortgaged chattels. Shelly-Rogers Company's operations extended to many counties in the western part of the state, into Wyoming, and into South Dakota. It sometimes happened that owners of mortgaged live stock sold it in markets other than South Omaha and did not account for the proceeds of the sale. In one case a train load of mortgaged cattle was thus sold and no account was made of the proceeds amounting to about \$20,000. If the corporation were insolvent, Shelly was not solvent. When the corporation ceased transacting business, Shelly converted into cash the property in his wife's name, and this money, in connection with other funds from mysterious sources, has been so invested as to produce a substantial fortune over which Shelly exercises complete dominion. Deducting from the aggregate established value of this property the sum of the liens thereon, there is an equity therein equal to the value of Shelly's estate at the time he embarked in business at South Omaha, while his creditors hold an aggregate of over \$40,000 in uncollectible claims against him.

The defendants' counsel insist that, while the evidence may establish a few isolated suspicious circumstances, it is insufficient to establish fraud. It seems to us that the proof has progressed from the realm of suspicion into the domain of fact. This court has ever scrutinized with care transactions between relatives which have a tendency to prevent creditors from collecting their just demands. *Plummer v. Rummel*, 26 Neb. 142; *Steinkraus v. Korth*, 44 Neb. 777; *Penn v. Trompen*, 72 Neb. 273. Fraudulent transactions are planned in secrecy, and proof of their details ordinarily is known to no one other than the actors. If the parties thereto in attempting to explain the transaction fail in their purpose, the presumption theretofore existing against them is necessarily strengthened. In this case the defendants, among other things, offer the following explanations: Mr. Shelly contends that his mother, Helen Shelly, loaned his wife \$2,000, which was invested in the academy property. Mrs. Shelly testifies that she borrowed \$1,000 from her mother-in-law; that all of the debt has not been paid, and that she borrowed about \$400 from Mr. Shelly's sister, Maud. A lead-pencil memorandum in Mr. Shelly's handwriting containing a statement of debits and credits, as we construe the writing, credits Mr. Shelly with one-half of the academy property and all of the flats, and charges him, among other things, with "mother 800." There are checks and stubs of checks of the academy company in the record showing several payments to Helen Shelly, and later to Maud Shelly, in sums of \$18 and \$36, respectively. These checks are uniform in amounts of either the smaller or the greater sum, and are so dated as to suggest that they were paid in satisfaction of accrued interest. The first check is dated December 26, 1903. Upon the stubs there is a notation to the effect that the check is to apply on "note." Mr. Shelly testifies that after his mother died, and by an arrangement among her heirs, Helen Shelly's estate became the property of his sister, Maud. This fact accounts for the later checks having been drawn in favor

of Maud Shelly, and it appears with reasonable certainty that, unless the rate of interest upon the loan from the elder to the younger Mrs. Shelly was less than 4 per cent. per annum, the debt did not exceed \$1,000, and probably was but \$800, the amount indicated in the lead-pencil memorandum, *supra*. Although these interest payments were made by the Chambers Academy Company, they are not charged to Mattie E. Shelly or to Thomas C. Shelly, a circumstance tending to prove not only that Mrs. Shelly is not the real debtor, but that Thomas C. Shelly actually owns the property controlled by the corporation. Whatever probative value this evidence may have, it discredits the testimony of Mr. Shelly and the testimony of Mrs. Shelly in exaggerating the amount of money borrowed from his mother. Mrs. Shelly also testified to having received money from her mother and from her mother's estate; but whatever she thus received came into her possession before the Thirty-second avenue property was constructed and in no manner aids in accounting for the money invested in the Chambers Academy. We have noticed that the testimony to sustain the contention that Captain Hawk invested \$6,300 in this corporation is so unsatisfactory that we are compelled to reject it. So, therefore, a consideration of the explanations offered by the defendants increases rather than diminishes the presumption which the law raises against the fairness and legality of the transactions which culminated in a fortune under Thomas C. Shelly's control, but safe from the demands of his creditors.

The conclusions we draw from the foregoing are: That in February, 1900, Mr. Shelly from his course of business expected to borrow in the name of Shelly-Rogers Company large sums of money from the plaintiff, from the Union Stock-Yards National Bank, and from dealers in commercial paper. His scheme to avoid personal liability as indorser of the firm's bills by incorporating had been largely frustrated by two of the corporation's principal customers insisting upon his personal guarantee of its

debts, which he had given. In the course of business he anticipated that this demand would be made by other of the corporation's customers. Shelly-Rogers Company, if forced to liquidate at that time, could not have paid all of its obligations, and Mr. Shelly knew that fact. Under these circumstances he withdrew from the capital employed largely in the name of the corporation the \$16,000 invested in the Thirty-second avenue property, and did so for the purpose of hindering, delaying, and defrauding his creditors, present and future, and the transaction cannot lawfully be sustained. *Ayers v. Wolcott*, 62 Neb. 805; on rehearing, 66 Neb. 712. Furthermore, Mrs. Shelly holds, and at all times has held, title to this property for the benefit of her husband.

Considering Mr. Shelly's financial condition and the hazardous nature of his business in 1900, and giving Mrs. Shelly the benefit of every reasonable doubt arising from a consideration of the evidence, these transactions should not be sustained further than to the extent of the homestead exemption of \$2,000, the value of the property previously given her by Mr. Shelly, which should not be valued in excess of \$5,000, the estate received by Mrs. Shelly from her mother valued at \$1,000 and \$1,000 borrowed from Mr. Shelly's mother. We make no allowance for increment to this fund by way of interest, because the Shellys have been supported out of no other fund since this property was sold. The homestead exemption is now attached to the West Dodge street property and should not be allowed elsewhere. We make no allowance for the alleged Hawk investment, because we find that he invested no money in this property. He is not a party to this action, and we do not presume to say that he will be bound by the decree that will be rendered herein; but for the purposes of this case he is eliminated as an owner of any of the property in litigation in this action.

We are of opinion that the plaintiff's contention that Shelly-Rogers Company should be treated as a partnership, and not as a corporation, cannot be sustained. Al-

though the assets of the partnership may not have equalled \$50,000 in value, yet so far as we are advised, in incorporating, the partners violated no law. They evidently placed an exaggerated valuation upon the firm's assets and unwisely loaded the corporation with the liabilities of the firm and of its members as indorsers of the discounted commercial paper; but the Union Stock-Yards National Bank dealt with Shelly-Rogers Company as a corporation and exacted the personal guarantee of its stockholders for its debts. No part of the debt in suit was traced back to the date of the incorporation. There is some testimony of a general nature which tends to prove an opposite conclusion, but it does not identify any specific debt in existence in January, 1899, and trace it, or any part thereof, into the debt represented by the judgment which the plaintiff seeks to enforce by this action. Shelly-Rogers Company exercised the franchises of a corporation without objection by the state for four years before it gave up the ghost. The plaintiff, in suing Shelly and Rogers upon their guarantee, refers to Shelly-Rogers Company as a corporation, and we think the case is within the rule announced in *Kleckner v. Turk*, 45 Neb. 176. The point therefore must be resolved against the plaintiff.

The defense of the statute of limitations fails, because the proof is satisfactory that the plaintiff did not have knowledge of the facts justifying an inference of Thomas C. Shelly's fraud until within less than four years before this suit was commenced. Code, sec. 12. Furthermore, the suit was commenced within two years after the judgment sought to be collected was rendered and therefore is in time. *Ainsworth v. Roubal*, 74 Neb. 723.

It has come to our notice that, although the plaintiff during the pendency of the action in the district court upon Thomas C. Shelly's guarantee settled and dismissed the action as to Mr. Rogers, no credit was given on the claim in suit. There may be some lawful reason for this act, and there may be no justification therefor. If we

understand the evidence, Thomas C. Shelly, after Shelly-Rogers Company failed, conveyed to the Union Stock-Yards National bank, or to some one for its benefit, certain lots of the value of about \$1,500. There is some evidence tending to prove that, as a result of the control this bank exercised over the assignee of the assets of Shelly-Rogers Company, a suit between that corporation and the bank over the proceeds of the sale of a herd of cattle was dismissed. If that claim were a just set-off, Shelly-Rogers Company should have had credit for it, and to that extent the liability of Shelly as guarantor would be diminished, and so also, the value of the lots conveyed, and the amount realized from the settlement with Rogers probably should have been deducted from the demand upon which Shelly was sued. For some reason, Shelly made no defense to the action; possibly he had none; possibly he feared to antagonize the plaintiff or its assignor; and probably he believed himself to be execution proof. So far as Thomas C. Shelly is concerned, his wife is in a position to hold the property sought to be subjected to the satisfaction of the plaintiff's judgment. To that end, can Mrs. Shelly or the Chambers Academy Company go back of the judgment recovered against Shelly and show that the claim upon which it is based was satisfied in whole or in part at the time the judgment was rendered? If they cannot, it must be because they are concluded by the judgment as Shelly is concluded. This position is sustained by *Candee v. Lord*, 2 Comst. (N. Y.) 269; *Swihart v. Shaum*, 24 Ohio St. 432; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Strong v. Lawrence*, 58 Ia. 55; *Ferguson v. Kumler*, 11 Minn. 62. On the other hand, in *Troy v. Smith & Shields*, 33 Ala. 469, an equitable action in the nature of a creditor's bill, it is held that the judgment is proof only of its existence, and does not bind a fraudulent grantee. We think the better rule in such actions is that the judgment, if regular on its face, is *prima facie* evidence of the amount of the debt, but that the alleged fraudulent grantee may by pleading and proof

bring forward any just defense the defendant in the action might have interposed to defeat the judgment in whole or in part. *Gottlieb v. Thatcher*, 34 Fed. 435; *Lanata v. Planas*, 2 La. Ann. 544; *Inman v. Mead*, 97 Mass. 310. The principle is also recognized in *Citizens State Bank v. Porter*, 4 Neb. (Unof.) 73.

We have not overlooked the fact that the plaintiff has suffered a considerable loss because of its inability to collect all of the notes purchased from Shelly-Rogers Company; but it did not reduce that claim to judgment, and it is doubtful whether it had a lawful claim against Shelly therefor. In the instant case, the plaintiff's rights are those of the Union Stock-Yards National Bank, and a court of equity should enforce the demand as though it were being prosecuted by the bank. It would be unconscionable for a court of equity to enforce a judgment, bearing 10 per cent. annual interest, beyond the amount justly due the judgment creditor, and the fact that the defendants have not put forward that defense should not close the eyes of this court to the real equities of the parties.

The judgment of the district court therefore is reversed and the cause remanded, with directions to permit the defendants, other than Thomas C. Shelly, if they are so advised, to amend their answers so as to set up any payment made by Shelly-Rogers Company or Thomas C. Shelly to the Union Stock-Yards National Bank upon the debt represented by the judgment upon which this action is founded, and to plead any lawful set-off or counterclaim that existed thereto on the part of the said Shelly-Rogers Company or Thomas C. Shelly, and to try those issues, if so presented, but that in any event it enter a decree subjecting the property described in this action, the legal title whereof is in the defendant Mattie E. Shelly or in the defendant Chambers Academy Company, to the plaintiff's judgment to the extent that it shall be held to represent the lawful debt of the defendant Thomas C. Shelly, saving and excepting, however, to Mrs. Shelly,

Parish of the Immaculate Conception v. Murphy.

first, \$2,000 homestead exemption in the "West Dodge" street property; second, from all of the property \$7,000 in value, which shall represent the money derived by Mrs. Shelly from her mother's estate, money borrowed by her from Helen Shelly and owing to Maud Shelly, and the gift from her husband. The decree to protect all persons holding valid liens upon the property, and to protect the interest of the defendant Willard E. Chambers, or his vendee, in the property of the Chambers Academy Company to the extent of the par value of one share of its capital stock.

REVERSED.

FAWCETT, J., not sitting.

PARISH OF THE IMMACULATE CONCEPTION, APPELLANT, v.
WILLIAM MURPHY ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,394.

1. **Religious Societies: GOVERNMENT: REVIEW BY COURTS.** "Where a local church or parish is a member of a general organization, having general rules for the government and conduct of all of its adherents, congregations and officers, the final orders and judgments of the general organization through its governing authority, so far as they relate exclusively to church affairs and church government, are binding on the local associations and their members and officers, and courts will not ordinarily review such final orders and judgments for the purpose of determining their regularity, or accordance with the discipline and usages of the general organization." *St. Vincent's Parish v. Murphy*, 83 Neb. 630.
2. ———: **POWER OF TRUSTEES: EXCOMMUNICATED PRIEST.** The trustees of a religious corporation organized under section 40, ch. 16, Comp. St. 1899, and in conformity with the canons, discipline and faith of the Roman Catholic church, have no authority by virtue of their office to permit an excommunicated priest to occupy the corporation's church edifice which was consecrated by its founders to religious worship according to the canons and discipline and faith of that church, or to exercise the faculties of a priest therein.

Parish of the Immaculate Conception v. Murphy.

3. ———: ———: INJUNCTION. If a majority of the trustees unite in diverting the temporalities of the corporation from the purposes to which they were devoted by its founders, a minority may maintain an action in the corporate name to enjoin such diversion.

APPEAL from the district court for Seward county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

C. E. Holland, for appellant.

Aldrich & Fuller, Norval Bros. and J. J. Thomas,
contra.

ROOT, J.

This is an action in equity to restrain the defendant from exercising any of the rights, faculties or privileges of a priest of the Roman Catholic church within the plaintiff's church edifice, and from interfering with Father O'Brien, the alleged regularly appointed rector of the parish, in the discharge of his duties. Before answer day a motion was filed by seven gentlemen, including the defendant, to dismiss the petition for the alleged reason that a majority of the plaintiff's trustees had not authorized the commencement of the action, but, on the contrary, desired that it should be dismissed. A motion was filed in the plaintiff's name to strike from the files the motion to dismiss, and upon issues informally joined, if they were joined at all, and without answer to the petition, the court heard evidence upon the substantial controversy between the contending individuals and dismissed the action. The court made no findings, but it must have adopted the theory of Messrs. McGowan, McNally, Murphy, Ward, Timoney, Schmidt and Jakl that by an alleged amendment to the plaintiff's articles of incorporation they became entitled to control its secular affairs, and by virtue of that authority had employed the defendant to occupy the plaintiff's church edifice and to celebrate the rites of the church therein.

The defendant William Murphy was also defendant in

St. Vincent's Parish v. Murphy, 83 Neb. 630, and this litigation arises, as did the contention in the *St. Vincent* case, over the order made by the bishop of the diocese of Lincoln excommunicating the defendant. In 1897 the bishop appointed the defendant as priest of the Seward mission, which contains two parishes, St. Vincent's, at Seward, and the Immaculate Conception, at Ulysses. In 1900 the members of the Ulysses congregation organized as a religious corporation under the provisions of section 40 *et seq.*, ch. 16, Comp St. 1899. The document subscribed by the individuals is brief, and contains statements to the effect that the signers had organized under the statute, *supra*, as a religious society "in conformity with the canons, discipline and faith of the Catholic church," had adopted the name of the Parish of the Immaculate Conception, and had selected as *ex officio* trustees the bishop and the vicar general of the diocese for the time being, the rector of the parish for the time being, and two lay members, Messrs. McNally and McGowan. The lay members of the board of trustees were to be selected annually "in conformity with the canons of the Catholic church and to hold office until their successors are elected and duly qualified." The statement was certified, and sworn to, by the clerk of the meeting, and was filed in the office of the county clerk of Butler county. Thereupon the members of that congregation by force of law became a corporation aggregate. Father Murphy participated in the incorporation, and continued to minister to the spiritual wants of the members of the congregations within the mission until removed by his bishop, and subsequently excluded from the church and parsonage of St. Vincent's parish by the judgment of the district court, which was affirmed in this court on appeal. *St. Vincent's Parish v. Murphy*, 83 Neb. 630.

Thereupon, in May, 1909, the defendant explained to his congregation at Ulysses the result of that litigation, and read to them certain amendments, which he suggested should be made to the articles of incorporation. These amendments were adopted at a subsequent meeting of the

congregation after two weeks' notice given after mass. The proof is satisfactory that most of the members of the congregation were present at the time the notices were given and attended the meeting when the amendments were adopted without a dissenting voice. The original articles were not repealed, but the amendments provide that there shall be nine trustees who shall be elected by the members in good standing of the parish. There shall be no *ex officio* trustees, and no one is qualified for the office unless he has been for one year prior to his election a member of the parish in good standing. The bishop and the vicar general of the diocese and seven laymen were elected as trustees. This action was instigated by the bishop of Lincoln, the vicar general of the diocese, and Father O'Brien, who has been appointed by the bishop as rector of the plaintiff parish. The seven laymen united in asking that this case be dismissed, and all of them testify that, so far as they know, the congregation want it dismissed and desire Father Murphy to officiate as their priest.

The plaintiff is incorporated as a society in conformity with the canons, discipline and faith of the Roman Catholic church. The statute so permits. The evidence is undisputed that, according to that discipline and those canons, local congregations and inferior officers of the church are under the jurisdiction and subject to the decrees of the higher officials and judicatories of the church with respect to ecclesiastical affairs, that the bishop of the diocese has authority to dismiss a priest or transfer him from one mission to another, and is vested with power to excommunicate priests as well as laymen within the diocese. The decree of excommunication was not admitted in evidence, but sufficient appears to prove in this informal proceeding that the bishop exercised his authority to exclude the defendant from the priesthood and the church. We do not say that this proof will be sufficient if the defendant answers and the issue is tried on its merits, nor do we say that there is any such privity between the parties to this action and those in *St. Vincent's Parish v. Murphy*,

can Union are a unit in refusing to coerce any individual to worship according to any faith or creed or to worship at all, but they do not refuse to protect property rights because they may thereby interfere with the religious convictions of some individual or aggregation of individuals. The constitution of this state contemplates that the civil courts may be called upon to protect religious denominations in the peaceable enjoyment of their own form of worship. Section IV of the Bill of Rights provides: "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, * * * Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." The fact that a majority of the plaintiff's trustees prefer that Father Murphy should occupy its church edifice and control and use the vessels and vestments contained therein and consecrated to religious purposes according to the canons and faith of the Roman Catholic church does not oust the civil courts of jurisdiction, nor will a denial by the court of Father Murphy's asserted right to occupy control and employ that property contravene the fundamental law, *supra*.

The legislature in providing for the incorporation of religious societies, sects, bodies and denominations enacted section 167 *et seq.*, ch. 16, *supra*, which apply with peculiar force to the organization of the Roman Catholic church, but the bishop of the Lincoln diocese did not avail himself of this law. The legislature also enacted sections 40-44, ch. 16, *supra*, which afford the members of religious associations the right on their own initiative to incorporate. They may do so independently of any superior organization, and reserve exclusive control to themselves of such property as they may acquire, or they may organ-

ize in subordination to the discipline and rules of any greater body of which they may form an integral part.

In the instant case the members of the parish at Ulysses did not reserve to themselves the right to acquire, hold and enjoy property free from the discipline of the parent church, but specifically stated that they organized in subserviency thereto. The word "Roman" was not incorporated in the articles, but its presence should be implied. Section 42, ch. 16, Comp. St. 1899, specifically states that the trustees shall have authority to obtain, hold and enjoy such property, real and personal, as they may acquire, "for the purpose of carrying out the intentions of such society or association." The incorporators of the plaintiff plainly stated their intentions to organize "in conformity with the canons, discipline and faith of the Catholic church." The discipline and canons of that church do not permit, but, on the contrary, forbid under pain of extreme ecclesiastical punishment, an excommunicated priest to celebrate any of the rites of the church or to exercise any faculty of the priestly office. While the civil courts will not assume to generally restrain an excommunicated priest from assuming to exercise the faculties of the priesthood, yet, if he insists in performing those functions in defiance of the mandates of his superiors having jurisdiction over him and in edifices which have been dedicated to the worship of the faith which he assumes to thereby represent, he perverts the trust which the law impresses upon property held for or dedicated to that worship, and the courts upon proper application will prevent that perversion. *Attorney General v. Welsh*, 4 Hare (Eng. Ch.) 572; *Miller v. Gable*, 2 Denio (N. Y.) 492; *Pounder v. Ashe*, *supra*; *Bonacum v. Harrington*, *supra*.

The trustees cannot authorize the diversion of the temporalities of the church from the purposes to which they were devoted by the founders. *Brunnenmeyer v. Buhre*, 32 Ill. 183. Litigation of this character has been sustained where so small a minority of an unincorporated association as one individual has complained that the temporalities of

a local congregation which formed part of a greater aggregation and was in subordination thereto were being applied to a purpose foreign and antagonistic to the discipline and faith of the parent organization. *Wiswell v. First Congregational Church*, 14 Ohio St. 31; *Attorney General v. Welsh*, *supra*; *Roshi's Appeal*, 69 Pa. St. 462. It is argued, however, that a majority of the plaintiff's board of trustees has the right to commence or dismiss suits, and the board, speaking through seven of the nine members and acting in accordance with the desires of practically all of the congregation, want Father Murphy to officiate as their spiritual consoler and minister and therefore this suit cannot be maintained.

We do not find it necessary to determine whether the amendments to the articles of incorporation are valid or otherwise, or whether a communicant of the church may or may not become a trustee unless the bishop of the diocese consents thereto. The bishop and vicar general are trustees of both boards, if it can be said that two boards exist, so that they are trustees of the plaintiff. In that capacity they have the right to institute and maintain any action which has for its purpose the vindication of the trust which the law impresses upon the property held in the plaintiff's name for use in conformity with the canons, discipline and faith of the Roman Catholic church. Such a suit may be maintained in the name of the corporation, and it does not lie within the power of a majority of the trustees, no matter how overwhelming, who are denying the authority of the church, to dismiss that action and thereby prevent the court from protecting the church from the intrusion of an excommunicated priest to the exclusion of a priest duly authorized by the ecclesiastical authority having jurisdiction over the subject. *First Reformed Presbyterian Church v. Bowden*, 14 Abb. N. Cas. (N. Y.) 356; *Mt. Zion Baptist Church v. Whitmore*, 83 Ia. 138, 13 L. R. A. 198. Nor is it material that nearly all of the present members of the plaintiff desire Father Murphy's ministrations. The original incorporators devoted the plaintiff's property to a

Parish of the Immaculate Conception v. Murphy.

specific purpose involving a trust for the benefit of all those individuals of the congregation who then desired, or in future years might desire, to worship Almighty God according to the faith and agreeable to the canons and discipline of the Roman Catholic church. The mutations of time have changed that membership, some of the incorporators doubtless have gone to their reward and new members have been received, but no financial consideration sustains their right to participate in the secular affairs of the corporation or of the religious functions of the church. Received as communicants of the faith, they will not be permitted to use its edifices for unlawful services or exclude its rightful minister from the lawful use of that property. If they prefer Father Murphy to Father O'Brien or to any other appointee of the bishop, they have the absolute right to worship under the direction of their chosen leader, to absent themselves from the plaintiff's church building and to refuse to contribute to the support of Father O'Brien or of the church, and the civil courts administering the law of the land will protect them in the lawful exercise of that right, but they should occupy, for the purpose of their worship, buildings and employ chattels not consecrated to another purpose.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

I do not express any opinion upon the merits of the controversy between the officiating priest and the congregation at Ulysses, on the one side, and the bishop and other church officers upon the other. That the present conditions are unfortunate cannot be denied. But in the settlement of property rights involved in such controversies the courts are sometimes called into action and are compelled to settle and adjust such rights. They do not hesitate to discharge the duty when a proper case is presented for adjudication. Was such a case presented to the district

court and is such an one presented to this court? The real and underlying questions are: First. Is the church at Ulysses now operating under and governed by its amended articles of incorporation? Second. Is the present and acting board of trustees of that church the lawful board of trustees, or is the previous board, in existence before the adoption of the amended articles, the legal board? Third. Is the board which appeared and moved to dismiss this suit the lawful and rightful board of trustees? If they are, they had an absolute right to insist upon the dismissal of this suit, and the decision of the district court in dismissing the case was correct, and the only order which should have been made. In order to reach a proper decision of the controversy, it will be necessary to decide these questions, and in their decision the question of the title of the newer board to the office, which it is claimed they are usurping, is to be solved before the consideration of the relief to be granted can be entered upon. Can that question be settled in an action for an injunction, or must these questions of law be first adjudicated in a proper legal proceeding by an action in the nature of *quo warranto* or otherwise? It is my opinion that a court of equity has no power or jurisdiction to decide this question. *Sherman v. Clark*, 4 Nev. 138. It must be remembered that, strictly speaking, this is not a suit by or against the church corporation. It is not a suit against third parties who are invading the rights of the corporation, but it is a suit among those claiming to be officers, all of whom are members of the corporate body. There can be no adjudication without first deciding who are the legal trustees. This should only be done in and by a court of law. Until that question is decided, equity cannot interfere to try the rights of the claimants. In my opinion the decision of the district court was right and should be affirmed.

Dodge County v. Burns.

**DODGE COUNTY ET AL., APPELLANTS, V. WILLIAM S. BURNS
ET AL., APPELLEES.**

FILED JUNE 13, 1911. No. 16,450.

Taxation: INHERITANCE TAX: CREDITS OF NONRESIDENT. The right to take by will a credit payable in the state of New York, but evidenced by a contract of sale for real estate within Nebraska, executed by the vendor and at all times during his lifetime retained in his possession at his residence in the state of New York, is not, in the absence of extraneous facts, which do not appear in the instant case, subject to an inheritance tax upon the death testate of the vendor.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

John W. Graham, A. Van Wagenen and J. A. Van Wagenen, for appellants.

C. E. Abbott and F. Dolezal, contra.

ROOT, J.

This is a controversy between certain counties in the state of Nebraska and the legal representatives of Ira Davenport, who in 1904 died testate a resident of the state of New York, over an inheritance tax. The representatives prevailed, and the counties appeal.

Ira Davenport at the time of his death had been for many years a resident of the state of New York, but owned land in the state of Nebraska. He also owned shares of stock in Nebraska corporations, and, as vendor, held contracts for the sale of real estate within this state. Subsequent to Davenport's death, his representatives paid an inheritance tax on the transfer of the title to the real estate and to the corporate stock. The taxing authorities of the state of New York levied a like tax upon the succession to the credits evidenced by the real estate contracts. In all of the proceedings leading up to this appeal, the taxing

officers and the courts refused to tax the succession to these credits. We have not discovered any of these contracts or a copy thereof in the bill of exceptions, nor is the substance of any of them stated in or proved by the evidence. Counsel for the respective litigants, however, agree in their presentation of the case that we should consider the subject in dispute as though the contracts were real estate mortgages, and we therefore shall confine the discussion to that point of view.

The appellants succinctly state the issue: "The question in this case is this: Does a debt owed by a resident of Nebraska to a nonresident, a duplicate of the contract evidencing the indebtedness being situated in the state of Nebraska, have such an existence or situs in this state as will make it liable to the imposition of the inheritance tax?" The case of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, is cited to sustain the contention that the obligation of the debtor is a thing within the state of his domicile sufficient to sustain an action *in rem* by way of attachment and garnishment, although the debt is payable in a foreign jurisdiction wherein the creditor resides. Assuming this principle of law to be correct, it is argued that, if a debt or the debtor's obligation to pay his debt is property within the state of his residence for the purposes of attachment and garnishment, it also there abides as property within the meaning of section 10706, Ann. St. 1903, which, among other things, provides that "all property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, *which property or any part thereof shall be within this state*, * * * shall be and is subject to a tax at the rate," etc. (The italics are ours.) To the mind of the writer of this opinion the logic is sound, but we are confronted by our former decisions which compel a contrary conclusion.

In 1886, in the case of *Wright v. Chicago, B. & Q. R. Co.*

19 Neb. 175, we held that a debt not payable in this state could not be seized by garnishing the debtor in this state. Subsequently, in 1893, we held in *American Central Ins. Co. v. Hettler*, 37 Neb. 849, that a debt due a resident of Nebraska from a Missouri insurance company maintaining a general office in Illinois could not be reached by attachment and garnishment proceedings in the state of Illinois. Thereafter, in 1900, in *Bullard & Hoagland v. Chaffee*, 61 Neb. 83, on the authority of the last-cited cases, it was decided that "it is the settled doctrine of this court that one can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor."

Notwithstanding the fact that we have refused to require a resident debtor to pay his creditor's creditor a debt payable in a sister state, we have given full faith and credit to the judgment of the courts of our sister states holding to the contrary. *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; *Hadacheck v. Chicago, B. & Q. R. Co.*, 74 Neb. 385. We therefore are in the position of extending to nonresidents the benefit of their local exemptions, of refusing to assist a local creditor to collect his claims against a nonresident debtor, and at the same time of sustaining foreign judgments which seize debts payable to the citizens of Nebraska. And so it is that, had a creditor of Ira Davenport in that gentleman's lifetime brought an action aided by attachment in Dodge county and by garnishment proceedings had sought to compel the vendees to pay into court the matured and unpaid purchase money on these contracts to satisfy his claim, the courts would have refused him relief. Can it be that this property which was without the state during the testator's natural lifetime was by the process of his mortal dissolution imported into this commonwealth? We think not. We do not forget that for the purpose of satisfying creditors simple debts due from a resident of Nebraska to Ira Davenport would support an administration of his estate in the proper probate court of this state, but these are not simple debts. These written

solemn obligations have never been within the state, but at all times since their execution have been in the possession of the vendor in the state of New York or in that of his legal representatives appointed by the surrogate court of that state. There are no Nebraska creditors of the Davenport estate, nor any other unsatisfied creditors. There is no proof of facts in the record to give the capital represented by these contracts a local situs, nor do we think that any significance should be attached to the fact that each vendee has in his possession within the state of Nebraska a copy of the contract of sale. That copy is the vendee's muniment of a title, to which no representative of Ira Davenport succeeds.

If the facts established by the evidence in this case call for an application of the inheritance tax law, real estate mortgages, if of sufficient value, held by nonresidents of Nebraska are subject to that tax upon the death of their owner. The tax is imposed by the statute, although its amount is to be ascertained by facts not reflected from the recitals in the mortgage deed. The tax becomes a lien immediately upon the death of the individual in whom the property was vested at the time of death, and continues for at least five years. The executors and administrators are also liable for this tax, whether they reserve funds of the estate to pay it or not. To hold that the right to succeed to the title to mortgage credits payable to a nonresident in a sister state or in a foreign country is subject to our inheritance tax law will cloud the title to many tracts of land within this state, will involve executors of the wills of nonresident testators in controversy, and subject them and their bondsmen to an unexpected liability, to which they may with difficulty in some instances respond. Of course, if the legislature intended the law to be thus construed, the fact that to do so will work a hardship in some instances is not a good reason for refusing to so apply it; but, if it is probable that the legislature did not intend to give this property a local situs for the purpose of taxation, the argument is entitled to some consideration. At their

Fuchs v. Chambers.

last session the legislature by enacting senate file 271 (laws 1911, ch. 105) provided that real estate mortgages and contracts like those considered in the instant case, executed subsequent to July 1, 1911, shall for the purposes of taxation have a situs in Nebraska, and directs the taxing officers to separately value and assess such property. It seems to us this legislation in a sense construes the inheritance tax law as contended for by the appellants.

A consideration of this legislation and of *Wright v. Chicago, B. & Q. R. Co.*, *American Central Ins. Co. v. Hetler*, and *Bullard & Hoagland v. Chaffee*, *supra*, convinces us that the district court was right, and its judgment therefore is

AFFIRMED.

FAWOETT, J., not sitting.

GUSTAVE A. FUCHS ET AL., APPELLEES, V. WILLARD E. CHAMBERS ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,480.

1. **Creditors' Suit.** Where it appears that a judgment creditor has exhausted his legal remedies, a court of equity will aid him in subjecting the interest of an insolvent debtor in a corporation to the satisfaction of his judgment.
2. ———: **REVERSAL.** The evidence in this case commented upon in the opinion, and *held* not to sustain the judgment of the district court.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

McCoy & Olmstead, for appellants.

Duncan M. Vinsonhaler, contra.

Root, J.

This is an action in equity in aid of an execution to subject Willard E. Chambers' interest in a corporation, the defendant Chambers Academy Company, to the payment of a judgment. The plaintiffs prevailed, and the defendants appeal.

The record discloses that the defendant Chambers and certain of his relatives in 1903 organized a corporation, the defendant Chambers Academy Company, with a capital stock of \$30,000, for the purpose, among other things, of constructing and operating a dancing academy in the city of Omaha. Two hundred fifty shares of capital stock of the par value of \$100 each were first issued, and subsequently 50 other like shares were issued. The defendant Chambers subscribed for, and there were issued to him, 62 shares of this stock, for which he paid but \$360 in cash, and his promissory note, which was subsequently canceled and returned to him. Chambers' wife also secured 62 shares in the same manner. Subsequently 13 additional shares of the stock were issued to Chambers and the same number to his wife. Chambers and his wife had neither capital in excess of \$720 nor credit in any amount, so that the corporation borrowed and used in constructing its building \$13,500 and secured the debt by mortgages upon its property. It was also compelled to give, and did give, the broker who negotiated these loans its notes for \$1,500 secured by like mortgages. The money was borrowed to pay into the corporation's treasury the money due from Mr. and Mrs. Chambers upon their stock. They agreed with the corporation to pay the debts, and to secure their engagement, on the day the stock was issued to them, transferred it to the corporation or to T. C. Shelley for the corporation's benefit. After the corporation's building was completed, Chambers taught dancing therein, and in June, 1904, with his wife, entered into a contract of lease for five years with the corporation for the use of its property, and agreed to pay as rent therefor \$4,000 per

Fuchs v. Chambers.

annum. In 1905 Chambers was interested in the Lyric theater in Omaha, but the venture proved unprofitable, and out of that transaction the demands against him sought to be enforced by these proceedings were created. In April, 1906, Chambers was in arrears \$3,550 in his payments of rent to the corporation, and during that month at a stockholders' meeting agreed to surrender to it all of his stock other than one share in consideration that the corporation release all of its claims against him. The proposition was accepted; the old certificates of stock were canceled, a new one for one share was issued to him, and the remainder of his stock, 74 shares, was issued to another stockholder who assumed his indebtedness to the corporation. In 1907 the plaintiff recovered a judgment against Chambers. One execution was issued and returned "no goods." Another execution was issued, and, as alleged, was levied upon the certificates of stock which had been canceled one year prior thereto. The court held that Chambers' shares of stock were worth \$114 a share at the time they were transferred to the company, or a gross sum of \$8,436, and exceed in value the amount of his indebtedness to the corporation by \$1,722.52. To that extent the transfer was held fraudulent and void, and the corporation was directed to deliver the stock to the sheriff within 20 days to be sold as upon execution to satisfy, first, the plaintiff's demand; second, the demand of an intervening creditor. Some argument is advanced concerning the validity of the levy; but, since the judgment creditor is insolvent, has no property real or personal other than his interest in the corporation which was seized to satisfy his debts, and this is an action in equity, we are of opinion that whatever relief the plaintiff is entitled to may be given in this action. Code, sec. 532.

A consideration of the evidence convinces us that the decree of the district court cannot be sustained. Counsel for the plaintiff concede that the court omitted an item of \$750 in favor of the defendants, but we are compelled to go further. The evidence is uncontradicted that Chambers

. paid the corporation but \$360 in money for his stock, and that when he settled with it in 1906 he was owing the academy company \$3,550 for rent. He also was under obligation to pay it the money borrowed for his benefit in an amount equal to the unpaid purchase price of his stock, plus \$750 commission thereon, with at least two years' added interest. The proof is undisputed that that debt with interest amounted to over \$8,000 at the time the stock was transferrd, so that, if the stock was worth \$114 a share at that time, this indebtedness plus the amount due for rent would more than equal the value of the stock.

The plaintiffs contend that the account between Chambers and the corporation copied from its books discloses a credit in his favor which should be considered, but we are unable to agree with them. There is no element of estoppel in this case. The corporation defendant has at all times had possession or control of Mr. Chambers' stock, and its claims against him are *bona fide*. In our judgment, the evidence will not sustain a finding of fraud with respect to the matters complained of in the petition. The share of stock owned by Willard E. Chambers is not specifically exempt from judicial sale, and should be delivered up to be sold upon execution in satisfaction of the plaintiffs' demand.

The judgment of the district court therefore is reversed and the cause remanded, with directions to modify the judgment so as to subject but the one share of stock of the defendant corporation held by the defendant Chambers to sale for the benefit of the plaintiffs; each party to pay his own costs in this court.

REVERSED.

SAMUEL P. JUSTUS, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED JUNE 18, 1911. No. 16,488.

- 1. Master and Servant: FELLOW SERVANTS.** One who for the purpose of qualifying himself to serve a street railway company as a conductor is permitted to go upon its cars and perform such service as the conductor directs is the company's servant, notwithstanding he receives no wages from his master. The motorman upon the car is his fellow servant.
- 2. New Trial: RELIEF IN EQUITY.** If in an action in equity to secure a new trial of an action at law it appears that the plaintiff's evidence in the law action did not establish a cause for action against the defendant, and that the court in that action fairly submitted the controversy between the parties, a new trial will not be granted, notwithstanding the plaintiff was prevented by accident from securing a transcript of the record of his law case until too late to give this court jurisdiction on appeal.

**APPEAL from the district court for Lancaster county :
ALBERT J. CORNISH, JUDGE. *Affirmed.***

T. J. Doyle and G. L. De Lacy, for appellant.

Clark & Allen, contra.

ROOT, J.

In March, 1907, the plaintiff in order to qualify himself for the occupation of a street car conductor, and by the direction of the defendant's superintendent, accompanied one of its conductors upon a car. The conductor was to instruct the plaintiff in the duties incident to the vocation. The plaintiff was injured before daylight and at a time when no passengers were in the car. The conductor and the plaintiff were each reading a newspaper as the car approached a switch which, if opened, would permit the car to pass from one railway to another. The motorman shut off the greater part of the electric current,

opened the switch, and again applied the current so that the speed of the car was suddenly accelerated. In the meantime the conductor, evidently under the impression that the car had stopped at a railway crossing one block distant, said to the plaintiff: "He (meaning the motorman) is waiting for you to flag the crossing." The following is quoted from the plaintiff's testimony: "And so I got up and threw the paper down and went to the rear end of the car, and just as I went to step off the car the car started with a sudden jerk, and instead of being plumb still—I thought it was still, but evidently the motorman had opened the switch and the car was slowly moving, and there was another car coming on the south track at that time, coming right by and ringing the bell, and by the noise of this car I could not recognize the fact that this car was moving at all. I thought it was absolutely still, but it was not, as I learned later. When I went to step to the street, the motorman turned the current on heavier, and the car started with a sudden jerk that throwed me in the street." The plaintiff further testified, in substance, that the conductor theretofore told him the cars were always flagged over the railway crossings, that is, that the motorman would stop the car when close to the crossing, and it was the conductor's duty to alight, walk ahead until he had a clear view of the railway track, and, if there were no approaching trains, to signal the motorman to proceed. He also testified that the conductor "told me to never alight from the car or board the car when it was in motion until I learned the business, that I would get hurt if I did. He said there was danger in doing that, and always alight from the rear and get on the rear of the car when I went to get on the car."

The defendant's negligence pleaded in the plaintiff's petition in the law action is that the conductor told the plaintiff they were at the crossing, for him to get off the car and flag it, and that while he was obeying that order "the defendant negligently and carelessly through its employees started said car with a quick jerk and rapid

speed, throwing said plaintiff through said negligence and carelessness, violently to the ground." The court instructed the jury that the plaintiff and the motorman were fellow servants, and no verdict should be returned for the motorman's negligence, but that, if the conductor negligently directed the plaintiff to alight from the car and he was injured while obeying the order, they should find in his favor, unless they found from the evidence that he was guilty of negligence which proximately contributed to the injury. The court also told the jury that the plaintiff would be guilty of such negligence if he alighted from the car while it was in motion.

There is a difference of opinion between counsel as to whether the plaintiff was in the defendant's employ or whether he was a mere licensee or invitee. Upon this subject interesting briefs have been submitted. We conclude that the district court was right in instructing the jury that the plaintiff was the defendant's servant within the meaning of the law of master and servant. The plaintiff was under the defendant's control preparing himself for its service and actually performing parts of that service as he acquired knowledge of its details. The fact that he did not receive wages during his apprenticeship does not destroy the relation. The opportunity given him to acquire the knowledge and skill to qualify him for the position he desired was the compensation he received for the services performed. *Barstow v. Old Colony R. Co.*, 143 Mass. 535; *Ladd v. Brockton Street R. Co.*, 180 Mass. 454; *Weisser v. Southern P. R. Co.*, 148 Cal. 426; *Millsaps v. Louisville, N. O. & T. R. Co.*, 69 Miss. 423.

We do not understand that counsel for plaintiff complain of the court's instruction that the motorman and the plaintiff were fellow servants, if it be conceded that the relation of master and servant existed between the plaintiff and the defendant. Neither servant had any control over the other. Both under the control of the conductor were engaged in running the car and were fellow servants. *Chicago, B. & Q. R. Co. v. Howard*, 45 Neb. 570;

Missouri P. R. Co. v. Lyons, 54 Neb. 633. Whether they were fellow servants or not, the evidence does not prove that the motorman did anything out of the ordinary in guiding his car from one track to the other or in accelerating its speed at the time and in the manner testified to by the plaintiff.

There then remains but the alleged negligence of the conductor for consideration. While it is pleaded in the petition that the conductor ordered the plaintiff to alight from the car and flag it over the crossing, and the plaintiff so testified, yet, when he repeats the language of the order, it is not a command, but a simple statement that the motorman is waiting for the plaintiff to flag the crossing. Construing the statement in the light of the instruction previously given, that it was the conductor's duty to alight and flag the car over the crossing, it may in reason be said that the conductor suggested that the plaintiff should alight. The conductor had also instructed the plaintiff not to board or alight from the car while it was in motion. In the absence of anything peremptory in the direction to flag the car, the statement should not be construed as an order to get off the car before it stopped. The plaintiff admits that the car was slowly moving when he started to step therefrom. If the plaintiff had grasped the handhold, he would not have been precipitated into the street, or, if he had followed the instruction to wait until the car stopped, he would not have been injured. The plaintiff had been instructed and warned about the danger incident to getting on or off of a moving car and knew there was a risk connected with such conduct. We do not believe that a dispassionate consideration of the evidence by a jury properly instructed concerning the principles of law that should control the case would result in a verdict for the plaintiff. In the light of the plaintiff's evidence, the court's charge is fair, and in our judgment should not be construed as contended for by the plaintiff's counsel.

Upon the entire record before us, we are constrained to

Walden v. Bankers Life Ass'n.

find that none of the rulings or orders made in the action at law were prejudicial to the plaintiff and that he has no cause for action against the defendant. The accident is to be regretted; it resulted in serious injury to the plaintiff, but the defendant is not by the law of the land made liable therefor. It would serve no good purpose to reopen the controversy, and a court of equity will not set aside a judgment for the sole purpose of permitting the defeated litigant to again press a demand which cannot be sustained.

The judgment of the district court therefore is

AFFIRMED.

DORA F. WALDEN, APPELLEE, V. BANKERS LIFE ASSOCIATION, APPELLANT.

FILED JUNE 13, 1911. No. 16,493.

1. **Insurance: ACTION: DEFENSE OF SUICIDE: BURDEN OF PROOF.** The burden is upon an insurance company to prove by a preponderance of the evidence a controverted defense that the deceased came to his death from poison self-administered.
2. ———: ———: ———: **EVIDENCE.** In such a case, the defense is not established unless the evidence so clearly and unmistakably points to the conclusion of suicide as to exclude all reasonable probability of death by accident or from natural causes.
3. ———: **EVIDENCE.** The evidence adduced in this case is referred to and commented upon in the opinion, and *held* sufficient to sustain a verdict for the plaintiff.
4. **Evidence: WRITTEN STATEMENTS: ADMISSIBILITY.** Where a written statement, alleged to have been found in the room where the corpse of an alleged suicide was discovered, is offered in evidence as part of the *res gestæ* of the transaction of his death, and it appears that several persons were in and about the room before the statement was noticed, and all of those persons were not called as witnesses, it is not an abuse of discretion for the district court to require proof that the statement or the signature thereto is in the deceased's handwriting before admitting the statement in evidence.

Walden v. Bankers Life Ass'n.

5. **Trial: EVIDENCE: OFFER OF PROOF.** In order that a party may avail himself of an error in rejecting the testimony of a witness on direct examination, he must make an offer to prove the facts he expected to show by such testimony.
6. **Insurance: ACTION: EVIDENCE.** The verdict of a coroner's jury that a person upon whose remains an inquest was held died as the result of poison self-administered is not competent evidence to prove that fact in an action to recover upon a policy of insurance upon the life of the deceased.

APPEAL from the district court for Phelps county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

C. J. Beedle and I. M. Earle, for appellant.

H. M. Sinclair, W. D. Oldham, W. P. Hall and T. F. Barnes, contra.

ROOT, J.

This is an action to recover upon a certificate of insurance upon the life of the late J. Ranson Walden. The plaintiff prevailed, and the defendant appeals.

The defense is that the deceased committed suicide by the use of cyanic poison, which, if established, should defeat the action. The cause was tried to a jury. No exceptions were taken to the instructions given, nor to the rejection of those requested.

1. The most important assignment of error is that the evidence does not sustain the verdict. The burden is upon the defendant to establish its defense, and the presumption is that Dr. Walden's death was involuntary. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Hardinger v. Modern Brotherhood of America*, 72 Neb. 869. The presumption may be rebutted, and must yield to facts clearly inconsistent therewith, and, if competent proof of facts and circumstances surrounding the death so clearly and unmistakably point to the conclusion of suicide as to exclude all reasonable probability of natural death or accident, the presumption will be destroyed and the defense

sustained. *Hardinger v. Modern Brotherhood of America, supra.*

The material evidence upon this issue, as we understand it, is as follows: The sheriff of Phelps county testified, in substance, that during a conversation with Dr. Walden in his office, between 10 o'clock and noon of the day the doctor died, he told him, at the request of the father of a young lady, that he ought to leave this woman alone, but the doctor replied that the affair had gone too far, and that he expected to marry the woman after procuring a divorce from his wife, and that a Mr. Falk, who accompanied the witness, told Dr. Walden that if he were in the doctor's place he would either leave the girl alone or leave the town. The interview continued five or six minutes, and the witness departed from the office at 11 o'clock or a few minutes thereafter. There is no evidence other than this testimony to prove that this woman is in life, that she resided in the state, that she was acquainted with the deceased, or that they had been in each other's company. On the other hand, the evidence is undisputed that the deceased and his wife were devoted to each other, that she frequently assisted him in his office, and that on the morning of the day of his death, when departing for his office, he had kissed her good-by. If the insinuation that Dr. Walden was infatuated with this young woman is justified by the facts, more proof could have been produced than appears in the record upon that point, and the jury might well question the existence of such a condition. Whatever may be the fact, the sheriff made no threat to Walden, and nothing is testified to that would have alarmed a timid man or discouraged an adventurous one if engaged in the unholy quest it is argued Dr. Walden was pursuing. Subsequent to the time the sheriff testifies to having talked with Dr. Walden, the dentist purchased a money order and remitted it to Detroit to pay for an office jacket which was shipped subsequent to his death. Evidently the dentist had not then determined to shuffle off this mortal coil.

About 12:30 o'clock Dr. Walden purchased a small quantity of cyanide of potassium. Walden had been in the habit of using the drug as an ingredient of a bath for dental plates and also used it in connection with plating silverware. He told the druggist that he wanted the drug "to put in his plating bath." To this point there is nothing sinister in the proof. About 1 o'clock the occupant of an office in the building where the doctor's office was located noticed that persons coming to Walden's office did not gain admission. There is no direct proof that the office door was fastened, but the fact may be inferred from the evidence. The doctor's wife was notified, and some time after 2 o'clock his father and some other person, not identified by the witnesses, upon entering the office found the doctor's corpse upon a sofa. There is some conflict in the evidence, but we think it fairly appears that the doctor's shoes had been removed, otherwise he was completely dressed. The evidence is uncontradicted that Walden's lower limbs were not flexed, his arms were not distorted, and his features were composed as though he were asleep. A distance of from 18 inches to 2 feet from the sofa a glass containing particles of a white substance was found upon the floor. There is some testimony tending to prove that this substance may have been cyanide of potassium; but no tests were made to ascertain the truth, and there is considerable evidence tending to discredit the conclusion. The evidence is also uncontradicted that the doctor used a like glass for a cyanide bath to cleanse his dental plates. There is some testimony to the effect that there were traces of a white substance near the corners of the deceased's mouth; but other witnesses, who were in the office as early as were the witnesses who testified to the fact, testify unequivocally that they closely inspected the dead man's face and found no foreign substance thereon. The deceased while in life was subject to severe fainting spells, but the underlying cause is not testified to. The evidence is undisputed that the corpse of one whose death is caused by cyanic poison furnishes definite physical evi-

dence of the fact, and that in the instant case all of those indicia were absent. In cases where the issue is suicide, and death was caused by the application of external force, such as gunshot wounds, the proof is beyond question that death was caused by violence, and the sole question to determine is whether the deceased set the force in motion which destroyed his natural life.

In the case at bar there is no direct proof that Walden's death was unnatural; but the fact must be established, if at all, by inference from the other facts and circumstances in the evidence. The strongest proof seems to be Walden's probable written declaration found in his office upon one of his letter-heads. The evidence does not prove who first saw the communication subsequent to Walden's death, and some doubt is cast upon its authenticity by the fact that the sole witness to the identity of the handwriting is impeached to some degree by other witnesses and by facts and circumstances testified to by the witnesses. The statement is as follows: "Dear Wife and All: I am going to leave this earth. Good-bye, good-bye Jas. I am using cyanide of potassium KCN. Pray for me and may God forgive me." The doctor did not state he was taking cyanide of potassium, but that he was using it, nor did he write that he was about to commit suicide. He often used the drug in his laboratory, and it is possible that one of the fainting spells to which he was subject was approaching and he had a premonition that it would be fatal. We do not say that an inference that Dr. Walden intended to take his life by the use of cyanide of potassium cannot be logically drawn from this communication, but we do say other and innocent inferences may likewise logically be deduced therefrom. If Dr. Walden had declared that he was about to cut his throat or to blow out his brains, and there were no visible marks upon his corpse, the declaration might be accepted as proof of suicidal intent, but could not in reason be received as proof of death by the use of a revolver or of an edged tool. So in this case, in the state of the record, with positive and uncontradicted

evidence that not an indication of cyanic poisoning appeared in Dr. Walden's remains, and like proof that, had he died from the effects of that poison, those indicia would have appeared, the declarations, while evidence of suicidal intent, do not in our judgment either necessarily or logically prove that Dr. Walden destroyed his natural life by taking cyanide of potassium. The declarations were misleading and evidently untrue in some particulars. Why should the jury necessarily accept them as true in others? No physician or other witness, expert or layman, testified that Dr. Walden's death was not caused by natural means. The jury could not honestly have found that any of the invariable indicia of cyanic poisoning were present. Should nature's evidence be rejected and inferences deduced from facts not necessarily inconsistent with death from natural causes be accepted to work a forfeiture of the defendant's undertaking? We think not. If cyanic poison be not accepted as the cause of Walden's death, there is no proof of death by other unnatural means, or by any force set in motion by the deceased. In our opinion the jury had a right to say the defendant utterly failed to connect the assured's death with cyanic poison.

2. The defendant presents an instructive brief to sustain its contention that the written declaration just referred to and one other writing found in the same room, but upon another desk, were parts of the transaction whereby Walden came to his death and were admissible without proof that they are in his handwriting. The letters may have been written by the deceased and may have been lying upon the tables at the time his body was first discovered and before any one had an opportunity to place them in the position where they were found, yet these facts are not proved in the evidence. The evidence does not disclose who other than Dr. Walden first saw them subsequent to his death. No attention seems to have been given them until at least several persons had come and gone. The trial judge of necessity is vested with considerable discretion in determining whether a proper foundation has

been laid for the introduction of evidence purporting to prove the circumstances surrounding a transaction.

After the witness Kingsley testified that the letters were in Walden's handwriting, exhibit 6, which is set out in full in the first division of this opinion, was admitted and read to the jury. Exhibit 5, a copy of the other letter, was not offered, as we understand the record, although an attempt was made to prove its contents. The defendant made no offer of proof after the court sustained the objections to this oral testimony. Therefore no foundation was laid to present the alleged error for the consideration of this court. The authorities upon this point are collated in 3 Neb. Syn. Digest, p. 3136, and will not be inserted here. The original communications were delivered to Mrs. Walden, and had been destroyed or mislaid by her so they could not be produced at trial. In none of the cases cited by the defendant to sustain its proposition that the letters were part of the *res gestæ* of the transaction were the circumstances so nearly like those in the instant case that they should control us. We are satisfied that the court did not abuse its discretion in ruling as it did, and the assignment of error is not well taken. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456.

Error is assigned upon the court's refusal to admit in evidence the verdict of the coroner's jury. That jury found that Dr. Walden came to his death by cyanic poison self-administered. Authorities may be cited to sustain the admissibility of this evidence; but they are based upon an adherence to ancient law which gave great credit to those verdicts and held the coroner's inquest to be substantially an action *in rem*. *United States Life Ins. Co. v. Vocke, Adm'r*, 129 Ill., 557. But in this jurisdiction a forfeiture of a suicide's chattels to the state does not follow as a matter of law upon a finding by the coroner's jury that the deceased committed suicide. There is nothing in our institutions or in our written law to justify a holding that the legislature intended to incorporate this feature of the common law into the laws of this state, and we have no

State v. Omaha Water Co.

hesitancy in declaring the verdict inadmissible as substantive evidence tending to sustain the defendant's defense that Dr. Walden committed suicide. *Germania Life Ins. Co. v. Lewin*, 24 Colo. 43; *Cox v. Royal Tribe*, 42 Or. 365; *Ætna Life Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203; *Wasey v. Travelers Ins. Co.*, 126 Mich. 119.

Upon a consideration of the record, we find no error prejudicial to the defendant, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

The issue tried in this case was whether the deceased committed suicide or died from natural causes. The company alleged that deceased committed suicide. It had the burden of this issue; but it is a civil action, and the company was required only to produce a preponderance of the evidence. I do not believe that it will serve any useful purpose to recite and comment upon the proof of suicide contained in this record, some of which is stated in the majority opinion. If anything can be proved by human testimony to a moral certainty, this evidence, I think, proves suicide, and no good can result from denying insurance companies the equal protection of the law.

LETTON, J.

I concur in this dissent. If such decisions are made, it is useless for an insurance company to attempt to defend on the ground of suicide in any case.

STATE, EX REL. CITY OF OMAHA, APPELLANT, V. OMAHA
WATER COMPANY, APPELLEE.

FILED JUNE 13, 1911. No. 17,095.

1. **Municipal Corporations: WATER-MAINS: AUTHORITY OF CITY ENGINEER.** The charter of the city of Omaha does not vest the city engineer with authority to compel the water company to elevate its water-mains.

2. ———: ———: **AUTHORITY OF CITY.** The fact that the city council and the mayor adopted plans prepared by its engineer for a city sewer does not in itself amount to an exercise of the police power, so as to require the water company to elevate a water-main unexpectedly encountered by the contractor in constructing the sewer according to those plans.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

John A. Rine, W. C. Lambert and Clinton Brome, for appellant.

Stout & Rose, contra.

ROOT, J.

This is a proceeding in mandamus to compel the respondent to elevate a water-main at the point in Eighteenth street where it intersects the path of a proposed sewer. The respondent prevailed, and the relator appeals.

In January, 1910, the city council and the mayor of the city of Omaha approved plans theretofore prepared by its engineer for a sewer in Burt street in that city. Subsequently about nine feet below the surface at the intersection of Eighteenth and Burt streets the contractor encountered a 24-inch water-main. Thereupon the assistant city engineer served a written notice upon the respondent to elevate the main, so that the sewer might be constructed beneath. On the 24th day of that month the city engineer served upon the respondent a second notice of like import, but withdrawing a previous offer that the city would pay the expense incurred.

The return to the writ relates principally to the alleged expense of elevating the main, the public inconvenience that will follow a temporary loss of the use of the pipe to convey water to the respondent's customers, and the probability of accidents; that the sewer can be constructed so as not to interfere with its efficiency or with the water-main; and that the respondent is willing to comply, if in-

inst damages caused by the undertaking and by the city the expense incurred. The city at seem inclined to yield to the respondent's at it is not necessary from an engineering at the water-main should be disturbed. If lieve the uncontradicted evidence adduced by it, the relator by changing the form of the ellipse at the point where it passes the water serving the same area and floor level as ob-sections of the sewer, will have as efficient a e bore were circular. The water pipe is the erving the city of South Omaha and parts of aaha with water. There seem to be no insur-ficulties in the way of elevating the water- h the expense will be considerable and some- dent's customers may be inconvenienced dur- water must be excluded while the change is It would seem, under the circumstances, that g parties should act in harmony to serve the ts with a minimum of expense.

question the relator's right in a proper exer- ice power to compel the respondent to change of its water-mains to accommodate sewers y the city subsequent to the time the pipes he streets, but we fail to discover any allega- fidavit and motion, which seem to have been he place of an alternative writ, that the city or otherwise has exercised that power, nor a the bill of exceptions any proof that this exercised in the instant case. We cannot ac- tor's argument that the mayor and the city oproving the plans prepared by the city en- sed their authority to compel a change in the his water-main. A copy of the plans is in l no reference is made to the water-main.

testifies, in substance, that the plans were the assumption that the sewer when com- be beneath the water-main, and therefore no

scheme was adopted for elevating it. When the unexpected happened, the city engineer and his assistant evidently assumed that the engineer had authority by virtue of his office to compel the respondent to take the action demanded.

Sections 43-47, ch. 12a, Comp. St. 1909, specify the duties and authority of the city engineer. Section 43 provides: "He shall perform such other duties as may be required by this act or by ordinance." In section 47 we find the direct legislative grant of authority to the engineer with respect to the control of water-mains. It is as follows: "He (the city engineer) shall supervise all sewer work and the construction, maintenance, cleaning and repairing of public sewers, culverts, drains, conduits and subways. * * * He shall be empowered, where necessary for the furtherance of public works or the abatement of nuisance, to cause the temporary suspension of the use of water, gas, sewer, or other service, or to cause the temporary removal of or discontinuance of railway tracks, or street car or other travel. * * * He shall prepare plans, specifications and contracts to be approved by the mayor and council for all public works to be done under his supervision, and he shall change or modify such plans and specifications when directed by the mayor and council." No ordinance extending this authority is in evidence, nor do counsel argue that one has been enacted.

No highly technical skill is involved in removing railways from the surface of a street, whereas changing the position of water-mains forming part of an intricate system supplying a great city with water involves technical skill, the expenditure of considerable money, more or less inconvenience to customers dependent upon the water company for their supply of water, and something of a hazard to property interests. It is evident that the legislature did not intend to vest the control of the water system of cities of the metropolitan class in the city engineer. Since the city has not legislated on the subject and has not directed the respondent to elevate the water-main in ques-

Girard Trust Co. v. Dixon.

tion, we conclude that the district court did not err in refusing to compel the respondent to obey the orders of the city engineer. Something was said in the argument about the alleged fact that the city is the beneficial owner of the water-works. No such an issue is tendered in the return, nor, as we are at present advised, is the fact material.

The judgment of the district court is

AFFIRMED.

GIRARD TRUST COMPANY, TRUSTEE, APPELLANT, v. MARILLA J. DIXON ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,402.

Limitation of Actions: MORTGAGES: ACKNOWLEDGMENT OF DEBT. Under section 22 of the code, signed and delivered letters written by a purchaser of mortgaged land to the holder of the mortgage arrest the running of the statute of limitations against foreclosure, where the letters, when reasonably and properly construed, contain an acknowledgment of the mortgage and of the existing indebtedness; no technical phrase or particular form of expression being required.

APPEAL from the district court for Logan county:
HANSON M. GRIMES, JUDGE. *Reversed.*

Albert Muldoon, for appellant.

Hoagland & Hoagland, contra.

ROSE, J.

Plaintiff is attempting to foreclose a 500-dollar mortgage on a quarter-section of land in Logan county. The trial court sustained a demurrer to the petition on the ground that the action is barred by the statute of limitations. From a judgment of dismissal plaintiff has appealed.

The note secured by the mortgage was dated February 10, 1892, and was due March 1, 1897. The suit was begun

September 9, 1907. The mortgage was executed by Abel Dixon and Marilla J. Dixon. The McKinley-Lanning Loan & Trust Company was mortgagee. Plaintiff is the holder of the mortgage. Through mesne warranty deeds duly recorded defendant John R. Penner acquired from the mortgagors the legal title to the mortgaged land. The deed in which Penner was grantee was dated September 22, 1897, and it contains covenants by the grantor therein as follows: "I am lawfully seized of said premises." "They are free from incumbrances, except a mortgage to the McKinley-Lanning Loan & Trust Company for the sum of \$500." "I have good right and lawful authority to sell the same, and I, with my executors and administrators, shall warrant and defend the same unto the said John R. Penner, his heirs and assigns forever against the lawful claims and demands of all persons whomsoever, except the above described mortgage and taxes." This mortgage was the subject of correspondence between Penner and plaintiff's agent from January 21, 1906, until November 29, 1906, but the letters are too voluminous to be reproduced here. January 21, 1906, less than ten years after the debt had matured, Penner wrote a letter to plaintiff's agent in regard to the land and mortgage in controversy, saying, among other things: "I thought I would write you a few lines in regard to that piece of land you are agent here for. I just found out that you were the agent for it here. Write to me, if you come to some kind of terms as to the mortgage. There is more against it than it is worth." The same letter also contains the statement that the original mortgagor had offered to release the mortgage for \$200, and continues: "I would like for you to see just what you can do about the matter, and let me know at once. If we can make a deal, it will be cash."

In reply to a letter demanding settlement in full by September 1, 1906, and threatening foreclosure, Penner wrote further, August 23, 1906: "I got my attorney to write you in regard to a settlement. He told me he could keep you out of the place for four years, but I would like

to make some settlement with you without any trouble. I can't pay you all this fall, for I got haled out and I am hard up. I will pay you part and renew the mortgage, or, if you knock off some, I might borrow the money and pay it all."

Plaintiff made the following proposition to Penner, September 14, 1906: "If you will pay all the delinquent taxes, including the year of 1905, and remit us \$115 for credit on the loan, we will make you a new loan on the land of \$500, payable in three annual instalments with interest at the rate of 7 per cent., you to bear all the expense of the continuation of the abstract, recording of mortgage, etc. This is the very best and the last proposition we will make you. If it is not accepted within ten or fifteen days we will pay the taxes and commence foreclosure."

This was answered September 25, 1906, as follows: "I will accept the proposition you wrote me and I will send you \$115 and pay one hundred taxes down and the rest later. I can't pay it all this fall. Fix out the papers and send and I will sign them." Because Penner did not agree to pay the taxes in full, the terms of his acceptance were rejected and plaintiff's former proposition was renewed as made. In reply Penner wrote: "Fix out the mortgage on that land and send it up, or come and I will pay the taxes. I believe you had better come or send a man."

June 21, 1907, plaintiff wrote another letter to Penner calling his attention to what appeared to be an error in the amount of interest due, and concluding: "We desire to arrange for a satisfactory settlement with you, and would be very glad to have you write us promptly."

The letters are set out in full in the petition, which states a cause of action, unless it shows on its face that foreclosure is barred by the statute of limitations. The action was commenced more than 10 years after the note matured, and the petition shows that nothing was paid on the debt or interest after March 1, 1894; but plaintiff insists that the bar of the statute has been removed under the

terms of section 22 of the code, which declares: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise."

After referring to the letters pleaded, Penner states his position as follows: "It is clear therefore the only inference that can be drawn from this correspondence is that there were negotiations pending between a party claiming to own an old mortgage upon the real estate and a person who claimed the ownership of the property, but who was not under legal obligations with reference to said mortgage, for a settlement and compromise of their controversy; that the owner of the land made an inquiry as to what kind of a settlement could be made, and the owner of the mortgage made a proposition of settlement; which after some controversy was accepted, and then the owner of the mortgage withdrew it. There is nothing in the letters of Penner unconditionally acknowledging a present subsisting debt upon this property in any definite amount, with a promise either expressed or implied to pay the definite amount, or admission that the land was liable for the payment of said definite sum. There was only a conditional agreement on his part to pay a certain sum to the plaintiffs in full satisfaction of their claim. There was nothing in the letters of Penner from which it may be inferred that he intended to prolong the time of legal limitation within which the plaintiffs might prosecute their action. When the plaintiffs by express letter repudiated the acceptance of their own proposition, the effect of this correspondence upon plaintiffs' cause of action was destroyed."

To prevent the barring of the action by an acknowledgment of the debt, a definite promise to pay it was unnecessary. In *Devereaux v. Henry*, 16 Neb. 55, the code was construed thus: "Section 22 of the civil code provides

three ways by which an action on contract may be taken out of the operation of the statute: (1) By the payment of part of the principal or interest. (2) By an acknowledgment in writing of an existing liability, debt, or claim, signed by the party to be charged. (3) By a promise of payment in writing, signed by the party to be charged. The statute does not require that all of those things shall exist before a cause of action is taken out of the operation of the statute, but only requires that some one of them shall exist; hence, if any one of these things transpires, then the cause of action is taken out of the operation of the statute."

In an opinion by the present chief justice, it was said: "While the statute requires an acknowledgment or promise, yet it is not necessary that either the word 'acknowledge' or 'promise' should be used by the party making the acknowledgment or promise. If the writing, by a reasonable and proper construction, amounts to an acknowledgment or promise, it is sufficient." *Rolfe v. Pilloud*, 16 Neb. 21. For the purpose of making such an acknowledgment, "no set phrase or particular form of language is required." *Harms v. Freytag*, 59 Neb. 359. In the case last cited it was held: "A letter in which a surety on a note states to the payee that he is informed that the note, describing it, is not paid, and asks the payee to collect the money due upon it, and declares that he 'will not longer be held good for the note' in case it be not promptly collected, is a sufficient acknowledgment of the indebtedness to arrest the running of the statute of limitations."

In *In re Claim of Bucker v. Estate of Korff*, 5 Neb. (Unof.) 194, the following rule was adopted: "A writing, to constitute an acknowledgment sufficient to take a debt out of the statute of limitations, must recognize the debt as existing, and contain nothing inconsistent with an intention on the part of the debtor to pay it."

Within the meaning of the code as construed by this court did Penner acknowledge the existence of the mortgage and of the debt secured by it? His letters must be

considered in the light of surrounding circumstances as disclosed by the petition. When he bought the land he accepted a deed in which the mortgage was recognized as an existing incumbrance. No part of the original debt has ever been paid. No interest was paid after March 1, 1894. Before the statutory period of ten years had run, and while the land was bound by the lien of the mortgage, Penner wrote to the holder thereof: "There is more against it than it is worth." This statement was in writing and refers to plaintiff's security for the debt. It was made when the lien was in full force, for the purpose of procuring for Penner's own benefit a release of the mortgage for less than the amount due thereon. The language, in the sense used, means that plaintiff's mortgage incumbers Penner's land for more than the land is worth.

Less than ten years after the debt matured Penner also wrote: "I got my attorney to write you in regard to a settlement. He told me he could keep you out of the place for four years." This, when construed with all the facts pleaded, is saying, inferentially at least, that plaintiff had a valid claim secured by mortgage which could be foreclosed after four years of litigation. The statements that "I can't pay you all this fall," that "I will pay you part and renew the mortgage, or, if you knock off some, I might borrow the money and pay it all," are of the same import as expressions in former letters and refer to what the writer thereof regards as an existing debt. When Penner's part of the correspondence is all considered, it clearly amounts to such an acknowledgment of the mortgage and of the debt secured as to arrest the running of the statute of limitations. The acknowledgment of the mortgage was an acknowledgment of the debt secured. *Foster v. Bowles*, 138 Cal. 346, 71 Pac. 494. In this view of the facts pleaded and of the law applicable thereto, the petition does not show on its face that foreclosure is barred. Cases announcing a different doctrine cannot be followed here under the code as construed by this court.

For the error in sustaining the demurrer, the judgment

Flinn v. Fredrickson.

below is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., dissenting.

The opinion in this case seems to be predicated upon section 22 of the code, but to my mind this section has no application to the case at bar. That section contemplates an acknowledgment of an *existing liability for the debt*. Penner was not liable for the debt, nor did he make any payment thereon. For the purpose of removing the lien of the mortgage from the land which he had purchased, but which mortgage he had not assumed or agreed to pay, he offered to himself execute a note and mortgage for a specific sum. While this offer was at first accepted, it was subsequently refused by plaintiff. Nothing whatever was done under it by either party. Under these circumstances I do not think there is anything in what he did which could operate to toll the running of the statute of limitations. I think the district court was right and the judgment should be affirmed.

FLOYD FLINN, APPELLEE, v. HENRY E. FREDRICKSON, APPELLANT.

FILED JUNE 13, 1911. No. 16,482.

1. **Assault and Battery: JUSTIFICATION: DIRECTING VERDICT.** Where justification is the only defense to a civil suit for assault and battery, the trial court should direct a verdict in favor of plaintiff, if the evidence is insufficient to sustain a judgment in favor of defendant on that issue.
2. **Chattel Mortgages: UNAUTHORIZED SEIZURE OF CHATTELS.** An unreasonable and arbitrary seizure of mortgaged chattels without cause for the purpose of foreclosing a mortgage securing an unmatured note cannot be justified under a clause authorizing mortgagee to take possession of the property, if he "should feel unsafe or insecure."

Flinn v. Fredrickson.

3. **Action: MOTIVE.** Where plaintiff has stated a valid cause of action for damages, his motive in bringing the suit is, at the trial, immaterial.
4. **Damages: QUESTION FOR JURY.** Where mental anguish, personal injuries and physical suffering are considered in determining compensatory damages, no method of exact computation can be devised, and the amount of the recovery must generally be left to the sound discretion of the jury.
5. **Appeal: CONFLICTING EVIDENCE.** A jury's determination of a fact upon conflicting evidence will not be disturbed unless manifestly wrong.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY. JUDGE. *Affirmed.*

Lysle I. Abbott and Ray J. Abbott, for appellant.

Albert S. Ritchie and Charles L. Fritscher, contra.

ROSE, J.

The petition contains two counts. In the first plaintiff demands \$2,000 for assault and battery, and in the second \$1,430 for conversion of an automobile. The jury awarded him \$650 on the first count and \$369.40 on the second. From a judgment on the verdict for the sum of the two items defendant has appealed.

The first ruling of which complaint is made is the giving of the following instruction: "You are instructed that the defendant has failed in this case to establish the justification pleaded by him in defense of plaintiff's petition, and that under the pleadings and proofs it is your duty to return a verdict for the plaintiff upon both causes of action."

In answering the first count defendant pleaded justification, alleging in substance: November 19, 1907, plaintiff owed him \$489.50, evidenced by three promissory notes, one for \$50 payable March 1, 1908; one for \$50 payable April 1, 1908; and one for \$389.50 payable in weekly instalments of \$25 each, beginning May 1, 1908. The notes were secured by a chattel mortgage on the automobile, and

while defendant was in lawful possession of it, April 4, 1908, for the purpose of foreclosing his lien, plaintiff attempted to remove it from defendant's garage. To protect his possession defendant took the automobile from plaintiff by force, using no more than was necessary, but while thus engaged was assaulted by plaintiff, and in defending himself forcibly put him out of the automobile, but used no unnecessary force in doing so.

It is shown without dispute, both by the pleadings and by the evidence, that defendant assaulted plaintiff and forcibly ejected him from the automobile. The proofs make it equally clear that defendant was the aggressor, unless at the time of the assault he had a lawful right to the possession of the chattel. Defendant sold the car when it was new for \$1,370, and at the time of the assault, about a year later, the notes given by plaintiff for the remainder of the purchase price had all been paid except one for \$389.50 payable in weekly installments of \$25 each, beginning May 1, 1908. Defendant was a dealer in automobiles. Plaintiff kept the car in controversy for hire. After the 50-dollar note due April 1, 1908, had matured, and before plaintiff had been assaulted four days later, defendant telephoned to plaintiff for the automobile, falsely saying it was wanted at his garage for hire. It arrived a little later in charge of an employee of plaintiff, and defendant seized it and kept it in his possession under the chattel mortgage. A portion of defendant's own testimony may be summarized as follows: Plaintiff called at the office of defendant April 4, 1908, and said he wanted to pay the 50-dollar note due April 1. Defendant told him how much was due, and plaintiff wanted to know how he arrived at the amount, and was informed that it included \$2 for a tank on the machine. Plaintiff refused to pay for the tank, and defendant made him a present of it. Plaintiff then paid the note due and interest, took the note, and before passing out of the office door said: "All right for you. You will be sorry for this. Get even with you." Two minutes later when plaintiff was running the automobile out of the

garage past the office, defendant jumped out and said: "Here! you can't take that car until you pay what you owe me on the mortgage." Defendant then pulled out the switch key, thus stopping the car, and returned to his office. A few minutes later the automobile with plaintiff in control was again in motion, heading toward the street. Defendant again rushed out, forcibly took possession of the automobile and ejected plaintiff. Defendant's cross-examination shows, also, that plaintiff paid the 50-dollar note with interest, and left without any demand having been made upon him for payment of the unmatured note, and that defendant at the time considered it was not due.

There is nothing to show that, from the time the note was paid until plaintiff started out of the garage with the car, defendant intended to detain it longer, or that he directed plaintiff not to take it away, or that the latter used any force in obtaining possession of it, or otherwise committed a breach of the peace in doing so. Had defendant a right to take the automobile a few minutes later? He attempts to justify his seizure under the chattel mortgage, which contains a clause authorizing him to take possession, if he "should feel unsafe or insecure." He knew when plaintiff executed the mortgage that the automobile was to be used for hire. He knew it was being used for that purpose. He had telephoned the falsehood that it was wanted at his garage for hire. There is nothing in the record to show an intention on part of plaintiff to use it for any other purpose. The debt had just been reduced \$50. In 27 days \$25 more would mature, and in default of payment thereof there would be nothing to prevent another seizure. When he saw the automobile rolling out of his garage with plaintiff in possession, he suddenly felt "unsafe and insecure," and rushed out, committed an assault, and took the property. The insecurity clause was never intended to serve such an unreasonable and arbitrary purpose. There must be a cause for feeling insecure. *Newlean & Hoad v. Olson*, 22 Neb. 717. Before the right to take possession of a chattel under an insecurity clause becomes operative,

Flinn v. Fredrickson.

the mortgagor must be about to do or must have done some act tending to impair the security. *Allen v. Cerny*, 68 Neb. 211; *Meyer v. Michaels*, 69 Neb. 138. In the present case there is no evidence tending to show that plaintiff was about to impair the security. The nature of his business was an inducement to keep the automobile in good condition.

Defendant further attempts to justify his possession through plaintiff's failure to comply with the following clause, which is also copied from the chattel mortgage: "Car to be insured by floating policy." It is urged by defendant that the failure to procure a floating policy was a breach of the mortgage and caused a feeling of insecurity. Both grounds are untenable. The clause is inserted in the mortgage with the description of the property, and failure to comply with its terms is not a stipulated cause for depriving mortgagor of possession at a time when there is no debt or interest due. For the purpose of creating a feeling of insecurity plaintiff's noncompliance is equally futile. The contract nowhere states which party was required to procure the "floating policy," and there is no pleading or proof of any custom controlling that obligation or showing the nature or purpose of the insurance risk contemplated. If it was plaintiff's duty to protect defendant's security by insurance, there is nothing in the record to show that it was not furnished in some form other than that described in the mortgage. Defendant's feeling of insecurity was not warranted by the proofs in support of his defense. It is clear that he had no right to the possession of the automobile when he forcibly took it from plaintiff. He committed an assault when he first pulled out the switch key and interfered with plaintiff's lawful purpose to use his own property and to transport his person to his place of business. The evidence would not justify a finding that plaintiff was the aggressor at any subsequent stage of the controversy. The trial court made no mistake, therefore, in charging the jury that defendant failed to establish the justification pleaded. Since

it is conclusively shown by the evidence that the right of possession was not in defendant at the time of the assault, the right of a mortgagee to forcibly seize the mortgaged chattels, where he is entitled to possession under the terms of the mortgage, will not be discussed or decided.

An instruction authorizing a recovery limited to the compensatory damages proved, if any, is criticised, because it does not direct the jury to take into consideration the facts in mitigation of damages. The instruction related to the assault and battery, and under this assignment defendant has not pointed out any evidence of mitigating circumstances which required such a direction, nor did he request an instruction conforming to his view of the law in that respect. There is nothing in the instruction itself, however, to require a reversal.

Exclusion of testimony tending to show that the action was brought to punish defendant rather than to establish plaintiff's rights is also assigned as an error. Testimony offered for such a purpose may be excluded. Where plaintiff has a valid cause of action, his motive in bringing suit is, at the trial, immaterial. *Jacobson v. Van Boening*, 48 Neb. 80.

The verdict of \$650 for the assault and battery is assailed as excessive. The assault was committed in a public place as the automobile was passing out of defendant's garage over the sidewalk in front. If plaintiff told the truth, and of that the jury were the judges, defendant grabbed him by the throat, hit him in the face, took him by the leg and tipped him over on his head. Plaintiff lost a tooth, got a black eye, and his lips and nose bled. He got up, put on his hat, brushed himself, and went away, while defendant called him a thief and said he was stealing that automobile. The crowd laughed. This is his story and the jury evidently believed it. Where mental anguish, caused by a humiliating assault in a public place, personal injuries and physical suffering are considered in determining the compensatory damages sustained, no method of exact computation can be devised, and the

amount of the recovery must generally be left to the sound discretion of the jury. The verdict does not show on its face that it is the result of passion or prejudice, nor does the evidence on which it is based disclose a substantial reason for setting it aside as excessive.

It is insisted, further, that the verdict of \$369.40 for conversion of the automobile is excessive. The purchase price of the car when new was \$1,370. There is testimony that it was worth \$950 at the time of the conversion, and that it then contained a chest of plaintiff's unmortgaged tools valued at about \$60. The verdict is less than the difference between the sum of these last two items and the amount due on the mortgage. It is argued, however, that plaintiff, through an intermediary, bought the car at the foreclosure sale, and that, having thus obtained it, he is not entitled to substantial damages for defendant's conversion, since he practically discharged his debt when he paid his bid. If the proposition of law implied by this argument is sound, a point not decided, still defendant has failed to direct attention to an error, because the question of fact as to whether plaintiff purchased the car at the foreclosure sale was submitted to the jury on conflicting evidence and decided in his favor.

No reversible error appearing in the record, the judgment is

AFFIRMED.

FAWCETT, J., dissenting.

I think the recovery on both causes of action is excessive.

As to the first cause of action, I do not think plaintiff was justified in attempting to forcibly remove the automobile from the defendant's garage. Conceding all that is said in the majority opinion about the manner in which defendant obtained possession of the automobile, that would not justify plaintiff in attempting to regain possession of it by force, and thereby bringing on a disturbance of the peace and inviting the physical encounter which ensued. Defendant had obtained possession of the machine peaceably. Conceding that he had obtained that posses-

Anderson v. Anderson.

sion deceitfully, plaintiff was not justified in attempting to forcibly retake it. If entitled to the possession of the machine, replevin, and not force, was his remedy. To justify the course he pursued is to return to the "wild and woolly" period, when the motto of "might makes right" was the accepted code. The record impresses me with the thought that plaintiff went to defendant's place of business, seeking trouble as well as his machine. He got the former, but not the latter. The judgment of \$650 for an assault, which in my judgment is not clearly proven, is grossly excessive.

As to the second cause of action, the evidence satisfies me that plaintiff at the sale of the machine under the chattel mortgage was the real purchaser, and he discharged his debt when he paid his bid. He should not be permitted to thus pay his debt and regain and keep the machine and at the same time recover a large judgment against defendant for conversion.

I think the case should either be reversed or plaintiff ordered to enter a substantial remittitur upon each cause of action.

**HULDA A. ANDERSON, APPELLEE, V. AXEL W. ANDERSON,
APPELLANT.**

FILED JUNE 13, 1911. No. 16,362.

1. **Divorce: EXTREME CRUELTY: CONDONATION.** Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned; and condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets.
2. ———: ———: ———. A promise of forgiveness for past wrongs is not, alone, sufficient to constitute condonation. To have that effect such promise must be followed by a restoration of the offending party to all marital rights.

Anderson v. Anderson.

3. ———: ———: ———: EVIDENCE. Evidence examined and referred to in the opinion *held* insufficient to establish a condonation by plaintiff of the cruelty alleged in her petition.
4. ———: INSANITY: PLEADING. Insanity, to be available as a defense in a divorce suit, must be pleaded.
5. ———: EXTREME CRUELTY: EVIDENCE. Evidence examined and referred to in the opinion *held* sufficient to support the decree of divorce on the ground of extreme cruelty.
6. ———: ALIMONY: EVIDENCE. Evidence examined and referred to in the opinion *held* sufficient to sustain the decree on the question of alimony.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

H. H. Bowes and John W. Battin, for appellant.

Alvin F. Johnson, contra.

FAWCETT, J.

From a decree of the district court for Douglas county, granting plaintiff a divorce and the custody of the minor child of the parties, and awarding plaintiff certain articles of household furniture and the sum of \$25 a month for the support of herself and the minor child of the parties, payable monthly, from April 10, 1909, until June 6, 1925, which would be during the minority of such minor child, defendant appeals.

The errors assigned are: The insufficiency of the evidence; that the alimony is excessive; condonement by the plaintiff; and the mental irresponsibility of the defendant for the acts committed by him on which the decree of divorce is based. The evidence is voluminous. We could not set it out in any intelligible manner without extending this opinion to an unwarranted length. Moreover, we do not think a review of the evidence would serve any good purpose either to the profession or to any of the parties to this suit. It presents a series of cruel acts upon the part of defendant, which fully justified plaintiff in refusing to

continue the marriage relation. We therefore hold that the evidence of cruelty is amply sufficient to sustain the decree.

An examination of the record satisfies us that the cruelty of defendant was never condoned by plaintiff. It appears that when she first left his home she went with her babe to the Scandinavian Young Women's Christian Association Home, where she obtained a temporary shelter and home. Defendant made repeated visits to the Home for the purpose of endeavoring to induce plaintiff to return. She declined to see him. Finally, a conference was arranged between the parties in the presence of the president of the Home, the clergyman who married the parties, and another clergyman who appears to have been a half-brother of defendant. At this interview, defendant admitted his acts of cruelty, but attempted to justify them upon the ground of a weakened condition mentally and physically. This condition, such as it was, appears to have been the result of excesses both prior and subsequent to his marriage. It was concluded at this conference that the best thing would be for defendant to remain away from his wife for at least a year, and possibly two, under conditions where he could have rest and a chance for recuperation, defendant thinking that if he had such an opportunity his manhood would be restored, and he could then have his wife and child back with him and treat his wife as a man should. Plaintiff agreed that if he would go away and take treatment for at least a year until such time as his manhood should be restored and he would return home and treat her as a husband should treat his wife, she would then return to him. To this he agreed, stating that his family would furnish the necessary means. Within three hours after the interview defendant left Omaha and went to Lincoln, where some two or three days later he voluntarily entered a private sanitarium. While in the sanitarium he became ill, and, regarding his condition as critical, he wrote plaintiff a very penitent letter and begged her forgiveness for his past wrongs. She evidently was greatly

moved by this, and at once wrote him, assuring him that she had forgiven him. She immediately followed this letter up by going to Lincoln to visit him, where, as she testifies, she found him in substantially the same condition that he had been in before the separation. She was told by the physician in charge of the sanitarium that his condition was improving. She returned home. Shortly thereafter defendant wrote to her that he wanted to come home. She answered thus: "Omaha, Feb. 10, 1908. Dear Axel: I have just received your letter and must say that I am terribly grieved over the fact that you are going to leave there if you continue to get better, *because I stand by what I said in the presence of several witnesses that as long as you are not well I will not live together with you.* Now you can judge for yourself if we shall separate absolutely or you stay away until you get well which I have been advised is going to take about a year, but how soon that time would pass if we afterwards could be happy. In haste, Hulda." Notwithstanding his agreement to remain away, and in the face of this letter from his wife, he on February 28, only about two months after going to the sanitarium, returned to the home in Omaha, and desired to resume conjugal relations with his wife, which she refused, for the reason that he had not kept his agreement. He at first stated, in effect, that he had only returned home on a visit; but he kept putting off his return to Lincoln from day to day until finally he declared that he did not intend to return. He soon began repeating his ill treatment of plaintiff, finding fault with her, using profanity towards her, and finally struck her three or four times. He denies the striking. She thereupon took her child and again left him, never to return. Plaintiff never, after the first time she left home, and after the agreement which it is claimed constituted the condonation, cohabited or in any manner resumed conjugal relations with defendant. It is evident, therefore, that there never was any completed condonation; and, if there had been, defendant's subsequent conduct revived all of his former cruelty. *Heist v. Heist*, 48 Neb. 794.

As to the mental irresponsibility of defendant for the acts complained of, it is sufficient to say that insanity was not pleaded as a defense, and that in the course of the trial, when plaintiff offered to introduce testimony upon that point, defendant expressly disavowed insanity as a defense; but, if it had been pleaded, the evidence falls far short of showing any such mental condition on the part of defendant as to in the least excuse him for his acts of cruelty. He has at all times been able to transact business and has been regularly employed ever since his wife left home the second time. His testimony given upon the witness stand and his statements at the time of the conference at the Young Women's Christian Association Home all show that he fully understood and comprehended the wrongs that he had committed. It would be a farce to say that his condition was such as to excuse him for the treatment which he had accorded his wife, not only in their home, but upon the public streets.

As to the alimony, under defendant's own testimony he is now earning an average of \$35 a month over and above his expenses and living, and receives \$60 a month rent from his houses, making a total of \$95 a month above the expense of his own living. He urges that nothing should be taken into account for the item of rent, as he claims he is indebted in an amount equal to the value of his real estate, and that it requires all of the \$60 a month to pay his taxes and interest and enable him to save his property. A considerable portion of the indebtedness is due to relatives, who do not seem to be pressing him. However that may be, after paying the \$25 a month for the support of his wife and child, and after securing his own living, he will still have left \$70, or, after deducting water rents, \$68 monthly income. We think it is not requiring too much to require him to take care of his indebtedness with that sum. The allowance of \$25 a month will cease at the time his little girl becomes of age. It will require a large portion of that sum for her support. Should she die before that time, the court is open

Hawe v. Higgins.

for a motion by defendant to modify the decree. Ann. St. 1909, sec. 5339. If defendant cannot pay the sum allowed for the support of his wife and child and support himself and save his property out of his present income, we are at a loss to understand how he could save his property, maintain a home, and support his wife and child if they were to return to him, as in his answer he states it is his desire that they should do:

We think the defendant has fared well at the hands of the district court, and that he has no just cause for complaint.

AFFIRMED.

JOHN HAWE, APPELLANT, V. MICHAEL A. HIGGINS, ADMINISTRATOR, APPELLEE.

FILED JUNE 13, 1911. No. 16,433.

1. **Vendor and Purchaser: JOINT PURCHASERS.** One who furnishes money to a purchaser of real estate under an agreement that he shall receive as his compensation therefor one-half of the profit which the purchaser may realize upon such purchase, does not, by reason of that fact alone, become a joint purchaser of such property.
2. ———: ———. In order to constitute such person a joint purchaser, it must further appear that he is, in fact, to become invested with an interest in the title and actual ownership of such real estate.
3. **Trial: SPECIAL FINDINGS.** A special finding by a jury, though sustained by the evidence, must be disregarded when the fact established by it is irrelevant to the issues tendered by the pleadings and insisted upon by the adverse party during the trial.
4. ———: **JURY: VIOLATION OF INSTRUCTIONS.** It is the duty of a jury to find a verdict according to the law as given in the instructions of the court; and when they clearly violate this duty the court should set aside the verdict.

APPEAL from the district court for Colfax county:
CONRAD HOLLENBECK, JUDGE. *Reversed.*

A. M. Post and George W. Wertz, for appellant.

J. J. Sullivan and W. M. Cain, contra.

FAWCETT, J.

In this opinion we have simply considered and decided the case actually tried in the district court and presented to this court.

The petition alleges that on July 13, 1908, the parties entered into a contract, not in writing, whereby defendant agreed to sell and convey to plaintiff within a reasonable time thereafter a quarter section of land, described, for the consideration of \$11,600; that on the 23d day of July defendant, pursuant to said contract, made and delivered to plaintiff a deed for such land; that thereafter, on July 27, "the defendant by fraud and force took and removed said conveyance from the possession of the plaintiff, and it is not now in the possession or under control of the plaintiff;" that plaintiff "has tendered to defendant the full agreed purchase price of said real property and demanded a deed of conveyance thereof, but the defendant has refused and now refuses to so convey said property, and has wrongfully and without plaintiff's consent rescinded the aforesaid contract of sale, to the plaintiff's damage;" that the land was during all of the times mentioned and now is of the value of \$16,000, and prays judgment for \$4,400.

The answer denies generally all allegations of the petition not admitted; expressly denies that defendant ever entered into any contract with plaintiff for the sale or conveyance to him of the lands in controversy; and alleges that on July 13 plaintiff and defendant engaged in a bantering conversation with reference to the taxation of farm lands in Colfax county; that in the course of such bantering conversation defendant "as a joke and a jest" offered to sell to plaintiff the lands in controversy at the assessed valuation for the year 1907, which was \$72.50 an acre; that defendant at no time intended to sell the land to

Hawe v. Higgins.

plaintiff, which at all times plaintiff well knew; that at the time of making said jesting offer defendant informed plaintiff that, if there was to be any one connected with said transaction "as purchaser" except plaintiff alone, said offer was withdrawn, and the defendant would not make any deed warranting the title to said land; that on July 23, "falsely and fraudulently representing to defendant that there was no one connected with the transaction as purchaser except plaintiff alone, plaintiff falsely and fraudulently sought to take advantage of defendant's aforesaid jesting and joking offer by accepting same and treating it as an actual offer, and caused a deed of conveyance of said land to be prepared, which deed, contrary to the aforesaid jesting arrangement of said parties, contained a covenant whereby the grantor covenanted to warrant and defend the title to said lands against the claims of all persons whomsoever;" that "on said 23d day of July, 1908, defendant, still believing that said deed was in furtherance of the aforesaid jesting arrangement between himself and plaintiff, and believing plaintiff's false and fraudulent representations that he, said plaintiff, was the only person connected with said transaction as purchaser, and believing that said deed contained no covenant whereby the grantor therein warranted to defend the title to said lands against the claims of all persons whomsoever, signed same, never intending to sell or convey said lands to plaintiff."

The reply admits that defendant conveyed to plaintiff the property mentioned in the answer for the consideration of \$72.50 an acre, and thereby covenanted to warrant and defend the title so conveyed, and denies each and every other allegation in the answer.

The following special interrogatories were submitted to and answered by the jury: "Q. 1. Did Higgins as a condition of the sale to Hawe stipulate that George Wertz should have no connection with the transaction? A. Yes. Q. 2. If you answer 'yes' to the foregoing question, state whether Wertz, without Higgins' knowledge, became connected with and had an interest in the transaction. A.

Hawe v. Higgins.

Yes. Q. 3. Did Higgins in negotiating with Hawe stipulate that the deed, which he was to give, should be a deed without recourse upon him? A. Yes. Q. 4. Did Higgins, when he signed the deed, which has been given in evidence, intend to make a deed which would be without recourse upon him? A. Yes." With these special findings the jury returned a general verdict for plaintiff for \$38.33. Plaintiff thereupon moved the court to set aside and vacate the special findings for the reasons: "(1) Said findings and each thereof are contrary to law. (2) Said findings and each thereof are unsupported by the evidence. (3) Said findings and each thereof are foreign to the issues in this cause. (4) The court erred in submitting said special findings and each thereof." Plaintiff also filed a motion for a new trial in which the special findings were again assailed. Defendant entered no objection or exception to the general verdict and made no move for judgment upon the special findings. Plaintiff's motion for a new trial was overruled and judgment entered upon the general verdict. Plaintiff appeals.

We think plaintiff's assault upon the special interrogatories submitted to the jury is well grounded. No. 1 called for the finding of the jury as to whether or not defendant as a condition of the sale to plaintiff stipulated that George Wertz should have no connection with the transaction. The allegation in the answer is: "Defendant informed plaintiff that, if there was to be any one connected with said transaction as purchaser except plaintiff alone, said offer was withdrawn," etc. It will be seen that the question submitted to the jury was broader than the issue tendered by the answer. We do not think it can be claimed that one who lends money to a purchaser of land to enable him to make the purchase thereby becomes connected with the transaction "as purchaser." The issue tendered by the answer was that the offer would be withdrawn if any one besides plaintiff was interested "as purchaser;" that is, as owner. Conceding that defendant had a right to impose conditions, when he alleges in his answer

the conditions imposed, as a defense, he is limited to those conditions upon the trial of the case and in the submission of the same to the jury. No. 2 is assailed for the reason that there was no controversy upon the question involved in that interrogatory. It was not disputed, but was testified to upon the trial by plaintiff and his witnesses, that Wertz, without defendant's knowledge, became connected with and had an interest in the transaction, in that he furnished the money for plaintiff to make the purchase, and in consideration for so doing was to receive from plaintiff a division of whatever plaintiff might realize in the way of a profit out of his purchase of the land. There being no controversy upon that point, that interrogatory should not have been submitted to the jury. Interrogatory No. 3 is objected to for the reason that this suit is not based upon the deed; that the only purpose of the deed in this suit was to prove the contract of sale and save it from the statute of frauds. Specific performance is not asked. We are therefore constrained to say, as does plaintiff in his brief, "Why ask the jury this question?" No. 4 asks the jury to say whether when defendant signed the deed he intended to make a deed which would be without recourse upon him. Upon this there is no dispute, nor did plaintiff make any objection to the deed being so signed. When the deed was prepared by Mr. Folda, the words "without recourse," either before or after the line for the signature of the grantor, were not written in. When defendant was about to sign the deed, he called attention to this fact, and stated that the agreement was that the deed was to be "without recourse." Plaintiff made no objection to his signing it that way; whereupon, he signed the deed, and then wrote under his name the words "with recourse." When interrogated upon the subject, he said that it was his intention to sign "without recourse," and that the writing of the word "with" instead of the word "without" was simply a mistake; but that he intended to sign the deed, and that the mistake was simply in using the wrong word in the pro-

posed limitation. The deed had not yet been recorded, and the evidence shows that plaintiff was perfectly willing to have that correction made. But suppose he had refused, after the money had been paid over and the deed delivered, to consent to such correction, that would not give defendant the right to get the deed in his possession for examination and then carry it away and refuse to return it. We are unable to see any justification in the submitting of any of the special interrogatories to the jury.

While we are impressed with the argument that, when the negotiation between plaintiff and defendant began, it was largely in the nature of banter, as contended for by defendant, the evidence is overwhelming that it soon passed beyond the stage of banter and jest. Defendant stated that farm lands were assessed too high. Plaintiff combated that statement, whereupon defendant said that he would sell his land at its assessed valuation. Plaintiff said that he would take the quarter section in dispute at that valuation, which it was conceded was \$72.50 an acre. Defendant answered that he would sell it to him at that figure. When asked how long a time he would give plaintiff to raise the money, he answered that he would give him ten days. Defendant testified that, when discussing where plaintiff would raise the money, plaintiff said he thought he could get it from Wertz; that he said, "I turned right to him, and said, 'I cut that man out. I will have no dealing with that man, or no deal that he is connected in.'" This testimony is contradicted by plaintiff, and by other witnesses who were present and heard the conversation. They all say substantially that no conditions were imposed. One witness testified that, when plaintiff asked defendant how long he would give him to raise the money, defendant said ten days, "and he said he did not care where he got the money so he got it." Another witness testified that he heard defendant say to plaintiff, "'You get the money and you can have the land;' Mr. Hawe answered him, 'You don't worry, I will have the money.'" * * * Hawe was

Hawe v. Higgins.

saying, 'You can depend upon it I will be Johnny with the money;'" that Mr. Higgins answered, "That is all I want." The same witness testified that on the evening of the 23d he heard defendant say, "That the land was sold and he had more to sell the same way," and Hawe said, 'If he had the money he would buy all he had to sell at that price.'" Plaintiff testified that the name of George Wertz was used in connection with his talks with defendant about raising the money. "Q. What did he say when you mentioned the name of George Wertz in connection with this case? A. Well, he said George Wertz' family and my family put together could not raise enough money to buy the land, and then he said that night, before the deed was made out, he stated something about his not wanting George Wertz' name to appear in it." The witnesses who heard the talk between plaintiff and defendant, and the banker to whom they went to have the deed drawn, all testified to the effect that they did not observe anything to indicate that the deal being discussed by plaintiff and defendant was not an ordinary transaction. The banker was asked, "Did you observe any evidence of jest or banter in the matter of this deal by either of the parties to the transaction? A. As I said, I think it was an ordinary deal. I observed nothing of a banter or jest about the matter." Defendant himself testified: "Q. And he said he would take this particular quarter in dispute in this action? A. Yes, sir. Q. And you said, 'All right, raise the money and you can have it'? A. Yes, sir. Q. Were you bluffing? A. Yes, sir. Q. And Mr. Hawe called your bluff? A. Yes, sir. Q. And he raised the money and you walked up to the captain's office like a man to make the deed? A. Yes, sir. Q. The joke was past then? A. Yes, sir." The evidence shows that on the evening of the 22d, one day before the expiration of the ten days defendant had given plaintiff to raise the money, Mr. Wertz deposited in the bank the purchase price, \$11,600, to the credit of plaintiff; that in order to raise this money he had made a trip to Lincoln, had done considerable telephoning, and had put up his own

Hawe v. Higgins.

securities; that on the 23d plaintiff and defendant went to the bank and instructed Mr. Folda to prepare a deed. The deed was prepared and signed in the manner already stated. Plaintiff drew his check in favor of defendant for the consideration, \$11,600. Defendant said he wanted the cash. The banker commenced getting out the money, some of it apparently in sacks of gold and silver, when defendant concluded that he did not want to carry the money away, and asked the cashier to give him a certified check, which was done. He then changed his mind again, and asked for a New York draft for the amount, which was drawn by the cashier. Defendant, who is a customer at the bank and in the habit of keeping private papers there, told the cashier to put the draft with his other papers. The deed was delivered to plaintiff, who was also a customer of the bank, and he handed it to the cashier, with the request that he keep it until he, plaintiff, called for it. The evidence further shows that plaintiff's arrangement with Mr. Wertz was that he would leave the deed in the bank until he made a sale of the land, which he intended to do at once, but no such statement was made or condition imposed at the time he delivered the deed to the cashier. The parties thereupon separated. Some two or three days thereafter defendant went to the bank, and asked Mr. Folda, the cashier, to let him see the deed. The deed was handed to him, he looked it over, put it in his pocket, and said he was going to take it and show it to his attorney; that it was not made out right; and upbraided Mr. Folda for the error in the deed, viz., the word "with" recourse instead of "without." When he left the bank, Mr. Folda left at the same time, and said he would go and tell Mr. Hawe that he, defendant, had taken the deed, and he did communicate that fact to Mr. Hawe. The deed was never returned to the bank nor again delivered to plaintiff. Instead of returning the deed to Mr. Folda, defendant asked him to figure up interest on the \$11,600 for five days. Upon Mr. Folda's doing so, defendant gave him his check for the amount of such interest,

\$12.90. Mr. Folda subsequently, on his own motion, and without the knowledge or consent of plaintiff, canceled the New York draft which had been issued to defendant, and testified that he is now holding the \$11,600, as well as the \$12.90 check. This conduct on the part of defendant brought about the present action by plaintiff. The evidence is ample to sustain a general verdict in favor of plaintiff.

In his instructions the court charged the jury, among other things: "9. If the jury believe from the evidence that the plaintiff and defendant entered into a contract for the sale of said land as set forth in plaintiff's petition, and the plaintiff has fully performed all the terms and conditions of said contract, and that the defendant has without just cause or legal excuse failed to perform his part of the obligations of said contract, then your verdict should be for the plaintiff.

"10. If the jury do not so believe, or if you believe from a preponderance of the evidence that said contract was made in a jest, and without any intention on the part of either party to comply with said contract, or if you do not believe from the evidence that the minds of the parties were fully in accord as to the terms of said contract, then your verdict should be for the defendant." Acting under these instructions, the jury returned a general verdict for the plaintiff.

Upon the question of the measure of damages in case the jury should find for the plaintiff, the court instructed the jury as follows: "8. If you find for the plaintiff in this case, the measure of plaintiff's recovery would be the profit that plaintiff would receive by reason of said purchase of said land. That is, the plaintiff would be entitled to receive as damages the market value of the land in question less the amount that he agreed to pay for said land. The market value of said land at said time must be determined by you from the evidence." The testimony of the witnesses on both sides placed the value of this land at that time at from \$80 to \$100 an acre. The lowest esti-

mate placed upon it by any one was that of defendant himself, who testified that it was worth and he could have sold it for \$80 an acre. There was no evidence before the jury which would warrant them in fixing a value upon the land of less than \$80 an acre; so that upon the undisputed evidence, and taking the lowest valuation which the jury had a right to consider, if they found for plaintiff, under the instructions of the court they could not return a verdict for less than \$1,200.

It is evident, therefore, that the jury disregarded the evidence and the instructions of the court and arbitrarily undertook to adjust this case upon a basis of their own. They were expressly told by the court that in determining the amount of plaintiff's damages, in case they found for plaintiff, the same "must be determined by you from the evidence," an instruction which the jury clearly disregarded. The law is well settled that it is the duty of a jury to find a verdict according to the law as given in the instructions of the court, and that when they clearly violate this duty, the court should set aside the verdict. *Standiford v. Green & Co.*, 54 Neb. 10; *Westinghouse Co. v. Tilden*, 56 Neb. 129.

Plaintiff has assigned error on the part of the court in a number of instructions given and refused, and urges that those assignments should be passed upon for the future guidance of the trial court. We do not deem it necessary to do so, for the reason that in the light of the views herein expressed the trial court will have no difficulty in instructing the jury upon another trial. We are unable to discover any theory upon which the verdict and judgment in this case can be sustained. The transaction, in its inception, may have been an "executory" joke; but the trouble is it later seems to have become "executed;" and executed jokes oftentimes bear very real fruit.

The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ROSE, J., dissents.

**JAMES M. DUNKEL, APPELLEE, v. HALL COUNTY,
APPELLANT.**

FILED JUNE 13, 1911. No. 16,453.

1. **Counties and County Officers: SHERIFFS: COMPENSATION.** Under the amendment in 1907 of the statute in relation to the compensation of sheriffs and their deputies (Comp. St. 1907, ch. 28, sec. 6a). the sheriff of a county having 16,000 to 20,000 population is entitled to receive a salary of \$1,500 per annum, as full compensation for all services rendered and duties performed as sheriff, payable monthly by warrant drawn on the general fund of the county.
2. ———: ———: ———. And the county board shall furnish the sheriff with such deputies as they may deem necessary, and fix their compensation, which shall also be paid by warrant drawn on the general fund.
3. ———: ———: **JAILERS.** Section 13, ch. 46, Comp. St. 1907, recognizes a distinction between the duties of the office of sheriff and those of the position of jailer, and gives the sheriff the election to act as jailer in person; and, if the sheriff does not so elect, it provides that the jailer shall be a deputy appointed by the sheriff.
4. ———: ———: ———: **COMPENSATION.** And if the sheriff in such a county performs the duties of jailer, in addition to his duties as sheriff, he is entitled, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer.
5. ———: ———: ———: ———. But if such sheriff elects to have the duties of jailer performed by some other person, selected by the county board, and appointed by the sheriff as deputy, and the county pays the deputy for actually performing such services the full compensation provided therefor, the sheriff is not entitled to the fees allowed for services as jailer, as provided in section 5, ch. 28, Comp. St. 1907.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Reversed.*

***J. L. Cleary*, for appellant.**

***R. R. Horth, W. H. Thompson and W. A. Prince*, contra.**

FAWCETT, J.

Plaintiff filed with the county board of Hall county a claim for services as jailer from April 23, 1907, to January 5, 1909, at the rate of \$1.50 a day; total, \$934.50. The claim was disallowed by the board, and plaintiff appealed to the district court, where judgment was rendered in his favor for the full amount of his claim. The county appeals.

The evidence shows that the sheriff did not, during any of the time covered by his claim, reside in the jail or actually perform the duties of jailer, but that such services were performed by one Henry Mehlert for a portion, by Emil Schroeder for another portion, and by Harry Chesley for the other portion, of the time covered by the claim. The services were performed by these men under the supervision and direction of the plaintiff, who was sheriff of the county. The sheriff furnished the necessities for the prisoners, such as food, bedding, etc., and was paid therefor. The three gentlemen named, in addition to cooking and caring for and looking after the prisoners and cleaning and caring for the jail and cells, also acted as firemen and utility men; that is to say, they attended to firing the furnaces which supplied the heat for the jail and courthouse, shoveled the snow from the walks in winter, and in summer cared for the lawn surrounding the courthouse and jail by mowing the grass and watering the same and by caring for and watering the flowers growing thereon. In all of this work they were assisted more or less by the prisoners in the jail. There were prisoners in the jail during all of the time covered by the claim, the number ranging from 1 to 25. In each instance these gentlemen first entered into a contract with the county board for a salary of \$50 a month, which was paid by the board by warrants drawn against the general fund of the county, and in each case, after entering into the contract with the board, the plaintiff (sheriff) contracted with them to pay them an extra \$10 a month, to compensate them for cooking for

the prisoners, and administered to each the oath as deputy sheriff. In addition to their salary, they were permitted to live in the jail, and were furnished their rent, heat and provisions free, the provisions being paid for by plaintiff. The question now presented is: Is the plaintiff, as sheriff, entitled to demand and receive from the county \$1.50 a day for compensation as jailer, in addition to his salary as sheriff? The district court found that he was so entitled. Prior to April 6, 1907, the office of sheriff was what is termed a fee office, but the legislature of 1907 changed this office from a fee to a salaried office, and under the provisions of section 6a, ch. 28, Comp. St. 1907, fixed the salary of sheriff in counties having 16,000 to 20,000 population, which included defendant county, at \$1,500 per annum, payable in monthly instalments at the end of each month by warrant drawn on the general fund of the county. By section 6b it is provided that the board of county commissioners or supervisors shall furnish the sheriff with such deputies as they may deem necessary, and fix the compensation of such deputies, who shall be paid by warrant on the general fund. Section 13, ch. 46 of the same statute, provides: "The jailer or keeper of the jail shall, unless the sheriff elect to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office; *provided*, the sheriff shall in all cases be liable for the negligence and misconduct of the jailer, as of other deputies." Section 5, ch. 28, fixes the fees to be charged by a sheriff for the performance of his duties as such, among which fees are: "For guarding prisoners when it is actually necessary, two dollars per day to be paid by the county. Where there are prisoners confined in the county jail, one dollar and fifty cents per day shall be allowed the sheriff as jailer. For boarding prisoners fifty cents per day," etc., and concludes as follows: "Provided further, that the sheriff shall, on the first Tuesday in January, April, July and October of each year, make a report to the board of county commissioners or supervisors under oath

Dunkel v. Hall County.

showing the different items of fees except mileage collected or earned, from whom, at what time and for what service, and the total amount of fees collected or earned by such officer since the last report and also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer."

It is contended by defendant that under these provisions of the statute it was the intention of the legislature that the amount fixed as a salary "for their services" was intended to cover any and all services performed by such sheriff, and that all fees earned by him should belong to the county; and that if plaintiff were allowed the \$1.50 a day as jailer's fees he would be required, under the terms of section 5, *supra*, to pay it over to the county treasurer. If that be a correct construction of section 5, then the sheriff would have to turn over all money collected by him for the 50 cents a day for boarding each prisoner, notwithstanding the fact that he had been obliged to previously advance his private funds in the payment for the provisions necessary for the furnishing of such board—expenditures which might eat up a very considerable portion of the salary allowed the sheriff for his services. We are unable to so construe this statute.

The other contention of defendant is not so easily disposed of, viz., that the sheriff in this case did not elect to act as jailer in person, as contemplated by section 13, ch. 46, *supra*; that the persons who performed the duties of jailer, as above set out, were duly sworn as deputies by the sheriff, and that the defendant board, as provided by section 6b, *supra*, fixed the compensation of such deputies at a sum in excess of \$1.50 a day and duly paid them their salaries by warrants drawn upon the general fund. We think this contention is sound, and that the fact that these gentlemen, while acting as jailers, performed, with the assistance of the prisoners, other services for the county as utility men or firemen is immaterial. By section 13, ch. 46, *supra*, it is clear that the legislature recognized a distinction between the duties of the office of sheriff and

those of the position of jailer. It gives the sheriff the election to act as jailer in person, if he sees fit so to do, in which case he would of course be entitled to the compensation provided for the performance of the duties of that position; but, if he elects to have the duties of jailer performed by some other person, to be appointed deputy sheriff, it certainly never was the intention of the legislature that the county should pay the deputy for actually performing such services, and also pay to the sheriff the fees allowed therefor. If the sheriff performs the duties of jailer, in addition to his duties as sheriff, he is entitled, under the amendment of 1907, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer.

Plaintiff places great reliance in *Kyd v. Gage County*, 38 Neb. 131. That opinion was handed down in 1893, at a time when the office of sheriff was a fee office, and what was there said is not applicable to the amendment of 1907. By that amendment a definite salary was fixed as full compensation for all services rendered and duties performed by a sheriff. With that salary plaintiff must be content. He cannot receive his salary for services rendered, and also recover for services which he did not render.

Summed up, the case stands thus: Plaintiff did not act as jailer. The three gentlemen named acted in that capacity. While they were selected by the board, they were sworn as deputies, and their services as jailer accepted by the sheriff. They earned the fees as jailer. The county paid them in full. The sheriff did not perform the services as jailer, and hence is not entitled to the fees provided therefor. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

**TOM BRADSTREET, APPELLEE, V. GRA
COMPANY, APPELLA**

FILED JUNE 13, 1911. No.

1. **Trial: MOTION FOR VERDICT: WAIVER.** Wh
fendant, when plaintiff rests, moves fo
and upon the overruling of such mot
ceeds with the trial and introduces ev
defenses set up in his answer, he the
assign error in the ruling upon such n
2. ———: **INSTRUCTIONS.** In the trial of a
error to refuse instructions requested
substance thereof is contained in the
court on its own motion.
3. ———: ———: **EXCEPTIONS.** Instructions
this court where no exceptions were
plaining until the filing of a motion fo
4. **Evidence: SECONDARY EVIDENCE.** On the c
required for the introduction of secon
tents of a lost instrument, a wide disc
court. *Haggood Plow Co. v. Martin*, 14
5. ———: ———. And where a copy of a
by the telegraph company, and the pa
inal thereof testifies that it is a true
he delivered such original telegram t
upon demand and also upon the trial
received such original, it is not error
evidence. *Whitney v. State*, 53 Neb. 2.
6. **Appeal: CONFLICTING EVIDENCE.** A verdi
approved by the trial court, will not
the appellate court.

**APPEAL from the district court for
R. HANNA, JUDGE. *Affirmed.***

Charles G. Ryan, for appellant.

Harrison & Prince, contra.

FAWCETT, J.

The petition alleges that on and long prior to September 26, 1906, plaintiff had an open account with the defendant bank as a depositor; that on that date one James McMillan drew the following draft: "Grand Junction, Colo., 9-26 1906. Tom Bradstreet: Pay to the order of Grand Valley Nat. Bank \$330.00-100, three hundred thirty dollars, value received and charged to account of J. A. McMillan. To Grand Island Banking Co., Grand Island, Neb.;" that plaintiff never authorized McMillan to make the draft; that said draft came into the possession of defendant some time between September 26 and October 2, 1906, the exact date being unknown to plaintiff; that defendant claims to have paid said draft on October 2, but whether cashed or paid by defendant plaintiff has no knowledge; that defendant wrongfully, illegally and without any authority whatever charged the amount of said draft to the account of plaintiff; that before the time when defendant claims to have paid the draft, and on or about September 28, plaintiff verbally notified the bank not to pay the same; that plaintiff did not accept said draft or agree to pay the same, or at any time authorize same to be paid out of his deposits or charged to his account; that plaintiff did not discover that the amount of the draft had been charged to his account until on or about November 3, 1906, when it was returned to him as a voucher with checks which had been charged to him by defendant, and that immediately upon the discovery thereof he demanded of defendant that it correct said account; and has repeatedly demanded of defendant the sum charged against his account, which demand has been refused; that the account between plaintiff and defendant has been fully settled, except said sum of \$330, which defendant still holds, and that it is therefore now indebted to plaintiff in said sum; that on July 5, 1907, he drew a check upon defendant for the amount of the draft, and payment thereof was refused.

The answer admits the dealings between the parties as

Bradstreet v. Grand Island Banking Co.

banker and depositor; admits the drawing of the draft by McMillan; and alleges that the draft was in due course of business received by defendant on or after October 2, 1906; denies that the draft was paid without authority or instruction from plaintiff; and alleges the fact to be that plaintiff instructed the defendant to pay the draft on its arrival, and, following such instruction and authority of plaintiff, defendant did, on October 2, pay the draft; and denies each and every other allegation in plaintiff's petition.

As a second ground of defense, it is alleged that McMillan was in the employ of and purchased horses for plaintiff in the west during the summer of 1906; that the draft in question was drawn by McMillan to pay for 19 particular horses which plaintiff received; that plaintiff also recovered \$200 from the Union Pacific Railway Company as damages for the negligent handling of said horses in course of shipment, and in said action claimed that he was the owner of such horses; by reason of all which defendant claims that plaintiff is estopped to deny the authority of McMillan to draw the draft or to repudiate the authority of defendant to pay the same.

As a third defense, it is alleged that on or about October 11, 1906, plaintiff's account was duly balanced, and the book, showing said draft charged to his account, was, together with other checks and vouchers of plaintiff, given to plaintiff, and that he has ever since said time had the draft in his possession and made no objections or complaints or offer to return said draft until the month of June, 1907; that plaintiff continued thereafter to deposit money in defendant bank and check upon the same, and paid defendant large sums of money upon notes and other forms of indebtedness, which was all done with full knowledge that the draft in controversy had been charged to his account; that on January 15, 1907, a final and complete settlement of all accounts between the parties was had, which adjustment included the draft in controversy, and that plaintiff then paid defendant all of his indebtedness and received his final balances on his account.

For a fourth defense, it is alleged that plaintiff, with a full knowledge of all the matters, and while having the draft in his possession, adjusted and settled his accounts with McMillan and included in said adjustment the amount of the draft; that at that time McMillan was responsible and was doing business in Nebraska and owned property therein; that after such settlement with plaintiff, and while plaintiff had the draft in his possession, and before he had made complaint to defendant, McMillan closed up his business in Nebraska and left for parts unknown to defendant; that defendant, relying upon the authority of plaintiff to pay the draft, was deprived of all opportunity to recover the same from or to make any adjustment thereof with McMillan; that defendant is informed and believes that plaintiff and McMillan are in collusion for the purpose of cheating and defrauding defendant, and that this action is brought in consummation of such plan; that by reason of his acts, laches, neglect and delay, and by reason of the acceptance and retention of the draft and the receipt of the benefits therefrom, plaintiff is now estopped to deny defendant's authority to pay the draft.

The reply traverses the allegations of the answer; denies that plaintiff owned the horses; admits the institution of the suit against the railroad company and settlement of the same; alleges that the action was commenced by the attorneys of McMillan and conducted in plaintiff's name only for the reason that the horses were consigned to him as a commission salesman and that he was present and could maintain said suit, while McMillan was absent; alleges that the pass book was balanced some time during the month of November; admits that the draft was returned to him, but alleges that he did not examine his vouchers immediately; that some time later, the exact date being to him unknown (but which date is fixed by his testimony as some time in November), he discovered that the draft had been charged to him, and immediately took the same to the paying teller of defendant bank, who had charge of pass books and vouchers for defendant, protested

against the same and demanded repayment of the money; that the teller requested plaintiff to give him time to straighten out the matter, stating that it would make him, the teller, trouble in the bank in the event the same was brought to the notice of the cashier; that he admitted he had made an error in paying the draft and charging the same to account of plaintiff, and that the delay in final pressing for payment was occasioned by the repeated requests of the teller for further time to enable him to try to get the matter straightened out with either McMillan or the Grand Valley National Bank. There was a trial to the court and a jury and a verdict for plaintiff for the full amount of the draft, without interest, upon which judgment was rendered, and defendant appeals.

Upon the trial, when plaintiff rested, defendant moved for a directed verdict in its favor, which motion was overruled, and the first error complained of is this ruling of the court. When defendant's motion was overruled, it proceeded without protest and introduced evidence in support of the allegations contained in its answer. We think this is a waiver of any right to now insist that the court erred in the ruling referred to.

The second error complained of is the refusal of instructions 1 and 2 tendered by defendant. Both of these instructions are covered by No. 14, given by the court on its own motion; hence, it was not error to refuse them.

By assignments 4, 5 and 6 it is urged that there was error in giving instructions 12, 14 and 15, given by the court on its own motion; but, as no exceptions were taken to the giving of these or any other of the instructions given by the court they cannot now be reviewed.

By the eighth assignment it is urged that the court erred in admitting in evidence a copy of a telegram, marked "Exhibit F," for the reason that there was no identification of this message, as being a copy of the original, "by any one." Plaintiff testified that, when he received the original telegram, he pinned it to a letter which he had received from McMillan and took the

same to defendant bank, where he had an interview with one of the bank officials with reference thereto; that he offered to leave the letter and telegram with the bank, but the bank official told him that it would not be necessary to leave the letter, and removed the pin and handed plaintiff the letter and retained the telegram; that thereafter, when the bank officials denied ever having received the telegram, he went to the telegraph office and obtained the copy, "Exhibit F," and that exhibit F was a true copy of the original telegram which he claims to have left with defendant. Having testified that he had left his original with defendant, and the officers of defendant claiming that they had made a search for such a telegram, but had been unable to find it, and had never received it, it was not error on the part of the court to admit the copy. The copy did not require proof by any official of the telegraph company that it was a true copy. The testimony of plaintiff upon that point was sufficient.

The other assignments, of which there are several, all relate to questions of fact in relation to the various matters pleaded. Upon all of these questions there is a direct conflict in the evidence. The jury were specially instructed as to each of the three affirmative defenses interposed. The case was submitted to the jury upon instructions to which defendant took no exceptions.

The evidence is sufficient to sustain a verdict either way. The court and jury saw the witnesses upon the stand, heard their testimony, and the jury by their verdict resolved all of these disputed questions in favor of the plaintiff. This verdict received the approval of the trial court. Under such circumstances, it is well settled that the supreme court will not interfere.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

JOHN C. OWEN, APPELLANT, v. THOMAS W. SMITH, WARDEN, APPELLEE.

FILED JUNE 13, 1911. No. 17,113.

1. **Parole: REVOCATION.** Under the provisions of section 570 of the criminal code, a parole granted by the governor of the state to a convict in the state penitentiary may be revoked by the governor at any time, without notice or hearing, for any reason which he may deem sufficient.
2. **Constitutional Law: REVOCATION OF PAROLE: REVIEW BY THE COURTS.** Said section of the code having conferred upon the governor full power to retake and reimprison any convict so upon parole, his act of revocation is the exercise of a sole discretion, which is not reviewable by the courts.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Price & Abbott, for appellant.

Grant G. Martin, Attorney General, and *George W. Ayres*, contra.

FAWCETT, J.

Appellant, John C. Owen, filed in the district court for Lancaster county his petition for a writ of habeas corpus. The petition alleges that on May 1, 1909, appellant, after having been convicted of assault with intent to commit great bodily injury, was sentenced to a term of five years in the state penitentiary; that on May 4, 1909, he was delivered to the warden of said penitentiary; that on September 9, 1910, appellant received from Ashton C. Shallenberger, the then governor of Nebraska, a parole, a copy of which is attached to and made a part of appellant's petition; that on October 11, 1910, the said Ashton C. Shallenberger, who was then still governor, "did unlawfully, wrongfully and without authority, and without any complaint having been made charging your petitioner with the

violation of any of the parole agreements, and without giving this petitioner a hearing, did revoke the said parole and order your petitioner to be returned to the state penitentiary of the state of Nebraska, from which he had been paroled as heretofore set out;" that on October 12, 1910, appellee "T. W. Smith, the warden of the Nebraska state penitentiary, to whom the executive order of October 11 was directed," caused appellant to be reconfined and imprisoned in said penitentiary, where, it is alleged, he "is now unlawfully, wrongfully and without authority so deprived of his liberty." Upon a hearing in the district court, the application for a writ of habeas corpus was denied, the action dismissed, and appellant remanded to the custody of the warden of the state penitentiary. From such judgment this appeal is prosecuted.

The only question to be considered is whether the governor after having granted a parole to a convict, may, without notice and hearing, revoke such parole and order the convict to be apprehended and reimprisoned for the remainder of his term of imprisonment. Appellant cites some authorities from other states which at first blush seem to sustain his contention; but an examination of those cases discloses the fact that they are based upon statutes essentially different from ours. As opposed to the cases cited by appellant, the attorney general has cited authorities based upon statutes similar to ours, which amply sustain the action of the governor. We do not deem it necessary to consider any of these cases, for the reason that we think the judgment of the district court must be affirmed under the very terms of the parole itself, and of section 570 of the criminal code, under which the governor acted. The parole issued by Governor Shallenberger, after setting out certain conditions to be observed by the convict while at liberty, concludes thus: "6. He shall, while on parole, remain in the legal custody and under the control of the Governor of the State of Nebraska. 7. He shall be liable to be retaken and again confined within the inclosure of the state penitentiary for any reason or rea-

sons that shall be satisfactory to the governor, and at his sole discretion, until he receives a copy of his final discharge through the warden."

Section 570 of the criminal code provides: "That the governor shall have power in the case of any prisoner, who is now, or hereafter may be imprisoned in the state penitentiary under a sentence other than murder in the first or second degree, who may have served the minimum term provided by law for the crime for which he was convicted (and who has not previously been convicted of felony and served a term in any penal institution within the United States of America), * * * to allow any such prisoner to go upon parole, outside of the inclosure of said penitentiary, to remain while on parole, within the state under the control and in the legal custody of the governor, and subject at any time to be taken back within the inclosure of said institution; and full power to retake and reimprison any convict so upon parole is hereby conferred upon the governor, whose written order shall be a sufficient warrant for all officers named therein, to authorize such officers to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process."

We think it is clear that under the terms of this section of our code, and under the terms of the parole itself, the governor acted clearly within his lawful powers; that he was not required to give any notice of his intention to revoke the parole of appellant, nor grant appellant any hearing before revoking the same. Any other construction of the law would not be a kindness to the inmates of the penitentiary; for, if the governor is given to understand that every time he grants a parole he thereby restores the convict to full citizenship to such an extent that he cannot revoke such parole except upon notice and a full hearing, he would be very loath to exercise the humane prerogative which the code now confers upon him. We think the provisions of the code were properly construed by the

Gundy v. Nye-Schneider-Fowler Co.

district court. Appellant was at all times, while on parole, in the legal custody of the governor, and subject at any time, for any reason or reasons that should be satisfactory to the governor, and at his sole discretion, to be reimprisoned. He accepted a parole containing the conditions prescribed by law and must abide by them.

The judgment of the district court is

AFFIRMED.

LELLIAN E. GUNDY, ADMINISTRATRIX, APPELLEE, V. NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,189.

1. **Master and Servant: DUTIES OF MASTER: QUESTIONS FOR JURY.** It is the duty of an employer to furnish his employee a safe place in which to work, and to inform him of all latent dangers connected with the employment. If the inquiry whether the employer has performed his duty in this regard so as to be free from negligence on his part depends upon facts and conditions to be ascertained from conflicting evidence, its determination is for the jury under proper instructions.
2. **Pleading: AMENDMENT: PREJUDICE: PRESUMPTIONS.** If a party is allowed to amend his pleadings at the trial, it should be upon such terms as are reasonable and will avoid prejudice to the opposite party. Prejudice from such amendment will not be presumed. It must be made to appear.
3. **Witnesses: CROSS-EXAMINATION: WRITINGS.** It is ordinarily improper to introduce writings in evidence as a part of the cross-examination of a witness. It may under some circumstances become necessary to do so, and the matter is generally within the sound discretion of the trial court.
4. **———: IMPEACHMENT: WRITINGS.** If a witness upon cross-examination identifies a letter as written by himself which contains statements tending to contradict or explain his evidence in chief, the latter is competent as impeaching evidence.
5. **Death: MEASURE OF DAMAGES: EVIDENCE: HARMLESS ERROR.** In an action by an administratrix to recover damages for causing the death of her husband, the measure of damages is her loss from a pecuniary standpoint by the death of her husband. Whether

Gundy v. Nye-Schneider-Fowler Co.

she was left in poverty or with ample means is immaterial. In such action the plaintiff was allowed to testify that she had no other means of support than the earnings of her husband. The petition contains such an allegation, which was not objected to. The evidence was given in connection with her testimony as to the amount of such earnings, and the jury were correctly instructed as to the measure of damages. *Held*. That it does not appear that the defendant was prejudiced by this evidence so as to require a reversal of the judgment.

6. **Trial: ACTION FOR DEATH: DAMAGES: INSTRUCTIONS.** An instruction in such case that the jury "should allow such amount as will compensate plaintiff for such support and maintenance as they find from the evidence she *should* have received from" the deceased, together with the further instruction that the plaintiff would be entitled to recover "such damages as would compensate her for the injury that you may believe from the evidence she has sustained by reason of such death," will not be presumed to have been understood by the jury to mean that she could recover the amount of support and maintenance that she ought to have. The meaning, when considered in the light of the statement of the case and the other instructions, is that the verdict should compensate her for the loss, caused by the death of her husband, of such support and maintenance as she would have received from him if he had lived. The giving of this instruction is not reversible error; the defendant not having requested any more complete statement upon this point.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed*.

Edgar M. Morsman, Jr., and Courtright & Sidner, for appellant.

C. E. Abbott, contra.

SEDGWICK, J.

The plaintiff's husband, Melvin R. Gundy, was employed as a carpenter in building an elevator for the defendant. While so employed he fell and was instantly killed, and the plaintiff, as administratrix of his estate, brought this action in the district court for Dodge county, and ob-

Gundy v. Nye-Schneider-Fowler Co.

and judgment for damages caused by his defendant has appealed.

The question presented by the defendant is as to the sufficiency of the evidence to support the verdict. It is a general denial of negligence on the part of the defendant which was the proximate cause of the accident, and an allegation that the accident was caused by the negligence of a fellow employee and the negligence of a fellow employee on a plea of assumption of risk. The elevator in question was constructed was 68 by 100 feet on the floor and divided into about 70 bins of various sizes. The bin in which the accident happened was 12 by 14 feet. The partitions of the elevator were constructed of two-inch planks, one above the other, and spiked together. At the foundation these partitions were six inches in width, and so continued to about 10 feet. They were then reduced to 6 inches and continued through about 30 feet more of the building. After that 2 by 4's were continued for the

When the accident happened they were on the walls and partitions, and had reached about 10 feet. In working on the walls and partitions they stood upon stagings, which were raised from the floor as the work progressed. There were three stagings, each bin of the size of the one in which the accident happened, and they appear to have been prepared when the building was begun. They were each a four feet wide and a little less than 14 feet long. They were constructed of two-inch planks with the partitions securely spiked across them, and on the top of the 2 by 4's dressed boards were securely spiked. A bracket was fastened with spikes in each corner for a support for these stagings, and two corners of the outside stagings rested upon these two corners of the other corners of the outside stagings and the corners of the inner staging were supported by lugs fastened in the partitions. These lugs were 2 by 8 timbers, 20 or 22 inches in length,

Gundy v. Nye-Schneider-Fowler Co.

and were placed crosswise, with the center resting upon the center of the partition, and the corners of the stagings rested upon the ends of these lugs. There were about 70 men employed in building these walls and partitions, and they appear to have assisted each other, if necessary, so that the building would progress in height uniformly. When the walls and partitions were built about four feet above the stagings, the brackets and lugs were placed and secured, and the stagings were raised and placed upon them. Mr. Gundy was assisting in raising these stagings when the accident happened. In doing this five men worked together; one of them fastened a rope to each corner of the staging to be raised, and passed a rope to each of the four men standing above, one being at each corner of the staging to be raised. The staging was raised by these ropes and placed upon the brackets and lugs. They had raised and placed one of these stagings at the side of the bin, and had raised the center staging nearly to its place, when Mr. Gundy fell with the side staging which had already been placed. Mr. Gundy was standing at the corner of the staging which they were raising nearest to the one which had already been placed. In the adjoining bin the staging had already been raised, and appears to have kept its position. The jury might reasonably conclude that, if this staging which these men had placed had been secure, the accident would not have happened. The inquiry was: Would this staging have fallen if all parties interested had acted with reasonable care and caution; and, if not, was it the negligence of Mr. Gundy, or the negligence of his fellow servant or the negligence of the defendant that caused the accident? And, if the conclusion is that the accident is not to be attributed to the negligence of any one, did Mr. Gundy assume the risk as a necessary risk of the employment? Mr. Gundy was about 45 years of age. He had worked at the carpenter trade principally, but not entirely, for 10 or 12 years. He had never worked upon a grain elevator before, and the evidence does not show that he had ever been employed upon a large or high

Gundy v. Nya-Schneider-Fowler Co.

He had been working about this elevator for per-
weeks. Most of this time he had been working
and preparing wedges with which to secure these
position. For five or six days he had helped on

He had worked upon no particular bin and
particular set of men, but had been sent from place
his help might be needed. Mr. Couch, his im-
eman, testified that he thought this was the first
Gundy had assisted in raising these stagings.
r of securing these stagings in position was left
the men. The same stagings were used in each
hout the progress of the work. They were not
rge as the bins in the beginning. There was
een the stagings and the partitions to enable
nove the brackets and saw off the lugs after the
ad been placed upon the higher brackets and
hey progressed through the work and laid nar-
s and partitions, there was still more room for
;. The sides of the partitions were not always
rue perpendicular line. When this was discov-
e superintendent it was corrected, but the re-
at in places this added still more to the size of
While the evidence is not certain upon this
jury might reasonably have found that the
ich fell with Mr. Gundy slipped off of the side
because there was too much room between the
: wall of the bin. The evidence is also uncertain
placed this lug and as to whether it was in the
ion. There was apparently reliable evidence,
reponderance of the evidence, from which the
have found that Mr. Gundy, while helping to
taging at the time of the accident, was standing
artition wall between the bin in which he was
ad the one immediately north, and, to prevent
alance because of the moving of the heavy stag-
ey were lifting, he placed his foot upon the cor-
staging which they had just put in place, which
under him and caused his fall. The superin-

Gundy v. Nye-Schneider-Fowler Co.

tendent and foreman testify that they frequently warned these men to be careful and place their staging securely. The jury may have considered this a very proper, and perhaps necessary, thing to do, even with experts, who had been with the work from the foundation and had learned how to protect themselves before the building had reached such a height as to greatly increase the danger; but there is no evidence that any such general instructions had been given after Mr. Gundy commenced working in these bins. The stagings in the various bins were raised simultaneously, and when the foreman directed the men to raise the staging at this particular time he told them in a general way to make the staging secure because they had reached the top of the building and this was the last raising, but there is no evidence that these directions were given in the presence of Mr. Gundy or that he had any knowledge of such instructions. It does not appear that these directions had any reference to their manner of raising them or to the safety of the men in so doing. There is no evidence that Mr. Gundy had received any instructions in regard to the manner of doing this work or in regard to the danger connected with it. The foreman testified that Mr. Gundy had no such instructions so far as he knew.

The burden of proof was upon the defendant to show that Mr. Gundy was guilty of negligence that was the proximate cause of the accident. The jury have found that the evidence does not establish these defenses, and the evidence is not of such a nature as to require us to interfere with their finding. Was there negligence on the part of the defendant that was the proximate cause of the accident? The burden was upon the plaintiff to establish this negligence. Is the evidence sufficient to support such a finding? The evidence shows beyond a question that the stagings were suitable and were properly constructed, and there is no defect in the materials or appliances furnished by the defendant. Could defendant by prescribing a uniform method of raising and securing these stagings prevent such accidents? Were the conditions of

Gundy v. Nyc-Schneider-Fowler Co.

s to require defendant to exercise greater ; the safety of the men? Was it the de- to know whether Mr. Gundy had had any is sort of work, and whether he understood the dangers connected with it? Were the ge of this work entirely justifiable in send- p of this structure to perform such duties? der such circumstances see to it that he iature of the work and the proper means of ety? To determine these and similar ques- suggested by the circumstances recited, derations to be derived from the evidence, l and difficult duty. These are not ques- t are to be determined by the jury, and, if tted, this court cannot interfere with the

nce of a fellow servant was the proximate cident, the plaintiff cannot recover. One had been in this part of the work from the helping to raise the staging when the ac-

He understood the work, and some of his tes that he was directing Mr. Gundy. gligence was the proximate cause of the ac- question of fact to be determined from a ! all of the conditions and surrounding cir- he evidence is not so clear and free from ese issues as to permit the court to dispense nce of the jury and determine the case upon v.

t complains that the plaintiff was allowed -tition before proceeding to the trial of the tion was quite comprehensive, and stated ause of action and the facts supposed to egligence of the defendant with great par- change made in the petition by the amend- ality a material modification of the theory action was begun. It was possible that the eriously prejudice the defense, but these

considerations do not furnish ground for amendments under the liberal provisions. Such amendments should be allowed if they are reasonable and will prevent any injustice to the party making the amendment. The defendant, however, made no showing of prejudice and did not ask for any delay in the granting of other relief that the court might grant. The action of the court that could be corrected.

Mr. Miller was one of the men engaged in raising the staging at the time of the accident, called as a witness by the defendant, and testified on matters very prejudicial to the plaintiff. On his cross-examination, he was asked to write a letter to the plaintiff's attorney in which he stated the circumstances of the accident, and answered the questions of the plaintiff's attorney. He remembered doing so. He was then asked to sign the letter and the defendant's attorney, in which, among other things, he stated that he knew all about it, and no one can give him more information. * * * It will pay you to come with you, or let her come with her all. I think you have a case." He wrote and mailed the letter. The court admitted this letter in evidence, which was objected to on the ground that it was not proper in cross-examination, that it was incompetent and immaterial. The court overruled the objection and the letter received. It is now insisted that the court erred in allowing it to receive such documents in cross-examination. However, under the circumstances this might be necessary, and the matter should be considered to rest in the sound discretion of the court.

The principal objection to this evidence is that it does not contain any direct allegation inconsistent with the evidence of the witness. The witness testified that Mr. Gundy at the time of the accident was standing upon the lug upon which

place the staging, which they were raising, in a very insecure and apparently dangerous position. In this he was contradicted by other witnesses, and his evidence upon this point, if true, was quite material as bearing upon the negligence of Mr. Gundy. The statement in the letter that he knew all about the facts, and that the plaintiff had a case, might reasonably be regarded as inconsistent with his evidence. In this view of the matter, we think the court might in its discretion allow the letter in evidence.

The plaintiff was allowed to testify that she had no other means of support than the earnings of her husband. This allegation was in the petition, and was not objected to by the defendant, but the defendant objected to allowing her to so testify, and now insists that the ruling was erroneous. It is said that the purpose was to show that the plaintiff was left destitute, and so arouse the sympathies of the jury. Of course, it was immaterial in this case whether the plaintiff was left in poverty or with ample means. The question was how much she had lost from a pecuniary standpoint by the death of her husband. It was proper to show what Mr. Gundy's earnings had been, and the manner in which he had supported his family. Under the instructions upon this point given to the jury by the court, it seems improbable that the jury should regard this evidence of importance except as tending to show that the earnings of Mr. Gundy were sufficient for the entire support of his family.

It is objected that the court improperly instructed the jury as to the measure of damages. In one instruction the court told the jury: "In determining such question, the jury should allow such amount as will compensate plaintiff for such support and maintenance as they find from the evidence she should have received from the said Malvin R. Gundy during his expectancy of life, not exceeding the sum of \$5,000," and in the next instruction, "In such case the plaintiff would be entitled to recover such damages as would compensate her for the injury that you may believe from the evidence she has sustained by reason of

Gundy v. Nye-Schneider-Fowler Co.

such death, which you should ascertain according to the evidence and rules laid down in these instructions." The defendant contends that the effect of these instructions is that "the measure of damages was the amount of her support and maintenance during the entire expectancy of her husband's life." We think that these two instructions, taken together, state the rule to be that the plaintiff should recover such damages as would compensate her for the injury, which would be compensation for the loss of the support and maintenance that she would have received from her husband, not such support and maintenance as she ought to have received. The language of the two instructions, when taken together, will not justify giving that meaning to the word "should" in the thirteenth instruction. The instructions, therefore, upon this point were not necessarily erroneous; and, if they were not as full and complete as desired, the defendant is not in a position now to complain, since it offered no instructions upon this point. There are no other objections to the instructions. The case appears to have been fairly and carefully tried.

The judgment of the district court is

AFFIRMED.

LETTON, J., dissenting.

Under the evidence in this case, I can see no legal reason for holding the employer liable. The opinion says: "The evidence shows beyond a question that the stagings were suitable and were properly constructed, and there is no defect in the materials or appliances furnished by the defendant." These stagings were to be placed upon projecting lugs put in position in the wall by the men themselves. The plank furnished for the lugs was proper, suitable, and not defective. The evidence is undisputed that one of the lugs was set a little too far from the corner of the building by another carpenter—a fellow servant—and the corner of the platform which should have rested on it went down when Gundy stepped upon it.

The general rule as to scaffolds in other jurisdictions, and in this state until this time (*Stevens v. Howe*, 28 Neb. 547), is that, "where the servant as part of his work is to construct a scaffold or other structure out of materials furnished by the employer, and the employer furnishes proper materials for that purpose, but the servant, by negligence either in putting the materials together or in selecting them, erects an unsafe appliance which results in injury to another servant, no negligence can be imputed to the master and he is not liable for the injury. In such cases the master's responsibility ends with the selection of suitable material and suitable men for the work." 20 Am. & Eng. Ency. Law (2d ed.) 82. 2 Labatt, Master and Servant, sec. 614; *Leishman v. Union Iron Works*, 148 Cal 274, 3 L. R. A. n. s. 500, and note.

The placing of lugs and the raising of the staging were performed by the carpenters as a part of their regular duties. Each carpenter assumed the ordinary risks of the business, among which was the carelessness of his fellow servant. Under the undisputed facts, the accident was not the result of any negligence on the part of the master, and as the law stood at that time no liability existed on his part. Since this occurrence the legislature, recognizing and realizing the unsatisfactory condition of the existing law, in the exercise of the police power, has wisely taken steps to protect workmen on such structures by the enactment of a law requiring safeguards. It is to be regretted that the act was not in force when this accident occurred. As the law then stood the employer was not liable.

BARNES and ROOT, JJ., concur in this dissenting opinion.

**LESLIE D. SPENCE, GUARDIAN, APPELLANT, v. HARDIN U.
MINER, SHERIFF, ET AL., APPELLEES.**

FILED JUNE 13, 1911. No. 16,418.

1. **Insane Persons: GUARDIANSHIP: JURISDICTION.** The county court has original jurisdiction of the settlement of the accounts of guardians of insane persons. Const., art. VI, sec. 16. And by statute this jurisdiction is made exclusive. Comp. St. 1909, ch. 20, art. I, sec. 3.
2. ———: ———: ———. When the county court appoints a guardian for the estate of an insane person, it is his duty to take possession of and control of that estate, and in doing so he is an officer of the court and brings the estate under the jurisdiction of the court.
3. ———: ———: **DUTIES OF GUARDIAN.** It is the duty of the guardian to furnish the ward with the necessaries of life suitable to his condition out of the ward's estate.
4. ———: ———: **JURISDICTION.** Courts of equity may determine the equitable rights of a ward under guardianship in suits in the nature of actions *in rem* which affect the property rights of the ward. In personal actions to establish a claim against the estate of the ward for necessaries furnished during the guardianship, the county court which has taken jurisdiction of the estate by the appointment of the guardian has exclusive original jurisdiction.
5. ———: **JUDGMENT: RELIEF IN EQUITY.** A personal judgment rendered by a justice of the peace against an insane person under guardianship for necessaries furnished during the guardianship, in an action against the ward alone, the guardian having no notice of the proceedings or that such necessaries had been furnished, and the plaintiff having notice of the guardianship, will be vacated in equity at the suit of the guardian, and the sale of the ward's property upon an execution issued upon such judgment will be enjoined.

**APPEAL from the district court for Johnson county:
LEANDER M. PEMBERTON, JUDGE. *Reversed.***

Hugh LaMaster, for appellant.

L. C. Chapman, contra.

SEDGWICK, J.

In October, 1902, David Duncan was appointed guardian of the person and estate of one William I. Young, incompetent and insane, by the county court of Johnson county. Afterwards, and during the guardianship of the defendant, Charles C. Reynolds sued the said ward before a justice of the peace in Lancaster county on account for board, and recovered a judgment for \$73.70 and costs. Afterwards a transcript of judgment was taken to the district court for Lancaster county, and from that court to the district court for Johnson county, and an execution issued thereon and placed in the hands of the defendant Hardin U. Miner, sheriff of Johnson county, and the sheriff was about to levy the same upon the land of the ward in Johnson county when this action was brought by this plaintiff, who is the successor of the said Duncan as guardian, to restrain the levy and sale of the land upon the said judgment. A general demurrer was filed to the petition and sustained by the district court, and, the plaintiff electing to stand upon his petition, the action was dismissed, and the plaintiff has appealed.

The petition alleges the facts above stated, and that said Charles C. Reynolds well knew that said David Duncan was, during all of said time that William I. Young was boarding with said Charles C. Reynolds, the duly and lawfully constituted guardian of the person and estate of said William I. Young, and well knew that said David Duncan was ready, willing and able, during all of said time, to furnish all necessities required by said William I. Young, but said Reynolds never requested said David Duncan to furnish necessities for said Young, and said David Duncan never refused to furnish any necessities for said Young, and said Charles C. Reynolds never made any demand or request upon the said David Duncan or upon this plaintiff for pay for said necessities alleged to have been furnished to said Young; and that in fact there was nothing due to said Reynolds on said account.

The constitution of this state provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts." Const., art. VI, sec. 16. The statutes are not as complete as they might be in regard to the practice of county courts in matters of guardianship, but there are several provisions that are in harmony with the above quotation from the fundamental law. When the county court appoints a guardian for the estate of an insane person, it is his duty to take possession and control of that estate, and in doing so he is an officer of the court and brings the estate under the jurisdiction of the court. The personal property and effects of the ward are subject to the control and direction of the county court.

It is the duty of the guardian to furnish the ward with the necessities of life suitable to his condition out of the ward's estate. When necessary, the district court may authorize the sale of his real estate, but only when the condition of his estate in the custody of the county court makes such course necessary. The petition in this case alleges that the guardian had no notice that any such liabilities were being incurred against the estate of his ward, or that there was any necessity therefor, or that any suit was begun against the ward, or that any such proceedings were contemplated until after the judgment was transcribed to Johnson county.

The statutes in regard to guardianship are not uniform in the several states, and there are various holdings in regard to the force and effect of judgments and decrees against a person under guardianship. It is generally, and perhaps uniformly, held that persons under guardianship may be sued in law actions as well as in suits that are in the nature of actions *in rem* which affect the property of the ward. He should be made a party defendant in various forms of actions, in which his interests are affected. In such cases the general guardian is also usually made defendant, and if he fails to appear to defend the

ward's interest in the property, or if there is no general guardian of an insane or incompetent person, the court will appoint a guardian *ad litem* to protect his interests. Such cases are to be distinguished from personal actions upon claims against the ward arising during guardianship when the estate of the ward is in the custody of a court which is given original jurisdiction to administer the same, and the general guardian has no knowledge of the action, there being no service upon him and no guardian *ad litem* is appointed. In this state the county court is by statute given exclusive original jurisdiction of the guardianship of insane persons and others. Comp. St., ch. 20, art. I, sec. 3.

Even where that is not the case, and several courts have concurrent jurisdiction, it is generally held that the court that first takes jurisdiction of the estate has exclusive control. *Johnstone v. Fritz*, 159 Pa. St. 378, 28 Atl. 148. In that case the court, quoting from another decision, say: "The latter court has exclusive jurisdiction of the account of the guardian. It cannot be deprived of that right by a judgment obtained against him before a justice of the peace." The opinion continues with the following: "But, even had there been no statutory bar, and the jurisdiction of the two courts been originally concurrent, that of the orphans' court, having first rightfully attached, must, in pursuance of the well-settled rule, have become exclusive. The possession and management of the estate having already passed into its grasp, and both guardian and minor under its control and direction, a wise public policy would have forbidden any interference with the exercise of its jurisdiction. Those who deal with either guardian or minor must deal subject to the approval or disapproval of this one tribunal, else there will be an end of intelligent administration, and a beginning of the evils resulting from conflict of jurisdiction. If the common pleas may take cognizance of questions of allowance, it may take cognizance of the conduct of the guardian and the settlement of his accounts, for the one involves the other. This the law will not permit."

The supreme court of Illinois refused to allow a bill in equity to enforce the payment of attorney's fees for services rendered a minor under guardianship out of funds that properly belonged to the estate of the minor. That court held that, where the probate court had appointed a guardian and taken jurisdiction of the estate, no other court would interfere and adjust certain items of account against the estate. Upon this point the court said: "Moreover, under paragraph 69, ch. 37, Rev. St., probate courts are clothed with original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and the settlement of their accounts. So far as the expenditure of the money in the hands of Martin Dougherty, Sr., guardian of Martin Dougherty, Jr., belonging to the ward is concerned, the probate court has full power and authority to make and enforce any necessary order. The law is well settled that a court of equity will not, except in extraordinary cases, take jurisdiction in the administration or settlement of estates. * * * It is also a well-established rule that where a court of equity assumes jurisdiction it will take the whole administration of the estate into its hands, and will not assume jurisdiction over a part." *Dougherty v. Hughes*, 165 Ill. 384.

The supreme court of California held that an action could not be maintained against the ward for legal services rendered the guardian in behalf of the ward's estate. *McKee v. Hunt*, 142 Cal. 526. The court said: "Both the administrator and the guardian are primarily liable to those whom they employ to aid them in the care, management, and protection of the estate, and the question as to the reimbursement of the administrator or guardian from the estate, for such necessary expenses as he may incur, is one solely between the administrator or guardian and the estate which he represents, and one which the court having jurisdiction of the estate has the sole power to determine."

In *Sturgis v. Sturgis*, 51 Or. 10, the law is stated in the

syllabus: "The property of the ward is in the custody of the law, and is not subject to attachment or execution, and the estate is administered under the direction of the county court; the powers and duties of the guardian in the management of the estate and payment of debts being specified in the statute."

In *Nolan v. Garrison*, 156 Mich. 397, the supreme court of Michigan, quoting from the opinion of Judge Cooley in a former case, said: "Complete jurisdiction over these subjects is conferred upon the courts of probate, and, if the interposition of equity is demanded, it must be for some purpose auxiliary to relief being sought in those courts. * * * But we think the circuit judge was entirely right in holding that whatever jurisdiction the court of chancery formerly had of these subjects is now conferred by our law upon the courts of probate. And we have no doubt that jurisdiction in those courts was meant to be exclusive, except as the court of chancery in exceptional cases might render them aid and assistance by means of such auxiliary remedies as might be needful to prevent wrong and injustice before the probate jurisdiction could be rendered effectual." In *Godde v. Marvin*, 142 Mich. 518, a bill in chancery was filed to vacate a judgment rendered against an insane person under guardianship. In the opinion the court states the general principle involved as follows: "It was conceded upon the argument that equity has jurisdiction of a suit of this character, and that the sole question for our determination was whether such injustice had been done as to authorize a court of equity to set aside the judgment of the court of law. 'It is well understood that before a chancery court will interfere with a judgment at law it must be made very clearly to appear that an injustice has been done,' " and concludes: "A decree will be entered vacating the judgment in that suit as to Richard D. Gregory, and avoiding all proceedings thereunder, or in enforcement thereof, as against him or his estate."

In that case the judgment vacated was upon a note

Spence v. Miner.

executed by the ward several years before he became insane and was placed under guardianship, whereas in the case at bar the judgment was for alleged necessities furnished to the ward while under guardianship, and furnished by one who knew of the guardianship. The petition demurred to alleges that these necessities had been fully paid for before the action was begun. There can, of course, be no doubt that under such circumstances the judgment against the ward was unjust. It was obtained in fraud of the right of the guardian to have notice and defend against it. The fact of the guardianship and the exclusive jurisdiction of the county court to adjust such claims would have been a complete defense if brought to the attention of the justice. There is no remedy for this plaintiff in the justice court nor by appeal. The demurrer to the petition should be overruled.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., concurs in conclusion.

ROOT, J.

I concur in the conclusion of, but not in all that is said in, the majority opinion. Especially do I dissent from those parts of the opinion holding that the appointment of a guardian for an adult incompetent by a county court vests that court with exclusive original jurisdiction to determine claims against the ward's estate. At common law an incompetent might be sued after inquisition of lunacy and the appointment of a guardian or committee. *Anonymous*, 13 Ves. Jr. (Eng.) *590; 22 Cyc. 1224; *Van Horn v. Hann*, 39 N. J. Law, 207; *Baird v. Steadman*, 39 Fla. 40; *Ingersoll v. Harrison*, 48 Mich, 234.

The Michigan cases quoted from and commented upon in the majority opinion do not sustain that opinion.

In *Nolan v. Garrison*, 156 Mich. 397, cited in the majority opinion, the chief justice of that court speaking for

it, recognizes the right of a claimant to sustain an action in the circuit court against an insane person under guardianship, but says that the power of that court is exhausted by the rendition of the judgment, "and payment must usually be enforced by suit upon the guardian's bond." The last utterance of the Michigan court upon this subject may be found in *Love v. Merrill*, 130 N. W. (Mich.) 1123, wherein they say: "The mode of acquiring jurisdiction over the person of an insane defendant in an action at law or in a suit in equity is the mode prescribed by statute for obtaining jurisdiction over the person of a sane defendant."

In *Love v. Merrill*, *supra*, *Ingersoll v. Harrison*, *supra*, is cited with approval, so that the Michigan decisions not only do not sustain, but are at war with, the law announced by the majority of this court. Neither does *Sturgis v. Sturgis*, 51 Or. 10, sustain the majority opinion. Judge Eakin, writing the opinion of the Oregon court, said: "Without deciding whether an ordinary creditor of the ward's estate may, in the first instance, bring an action therefor, it appears that this is not a liability upon the contract of either the ward or the guardian; but, if there is a liability, it is statutory, and may be established *in any competent court by judgment against the ward.*" (The italics are ours.) The conclusion of that court is that an ordinary judgment recovered against an incompetent under guardianship is not void, but that it can only be enforced through the county court, and not by execution against his estate.

We do not challenge the law announced in the Oregon and Michigan cases, but it does not sustain the evident drift and purport of the majority opinion. Courts of last resort quite generally hold that a judgment obtained against an insane defendant is not void and subject to collateral attack, but, if so unjust that it would be against good conscience to enforce it, equity will interfere. *Withrow v. Smithson*, 37 W. Va. 757; *Johnson v. Pomeroy*, 31 Ohio St. 247; *Pollock v. Horn*, 13 Wash. 626; *Allison v.*

Taylor and Washburn, 36 Ky. *87, 32 Am. Dec. 68, and monographic note of Professor Freeman, p. 70. See, also, note to *Spurlock v. Noe*, 39 L. R. A. 779 (19 Ky. Law Rep. 1321). Neither the constitution nor any statute in precise language or by fair implication prohibits any court from entertaining suits against an incompetent, whether he be under guardianship or not. The fact that the county court has exclusive jurisdiction to settle the accounts of guardians does not seem to the writer to withdraw from every other court authority to litigate and determine causes of action asserted against a ward. The claimant may submit his demand to the county court for adjudication, and ordinarily such is the better course to pursue. In the case at bar the guardian was appointed by the county court of Johnson county, and as we understand resides in that county; his ward is an adult, and seems to have been permitted to go at large and to reside for a time in Lancaster county. If while residing there the ward was supplied with the necessities of life under such circumstances that the law should bind his estate to pay therefor, the creditor ought to be permitted to sue him in Lancaster county, if he could be summoned therein, to determine the amount of that obligation. If a guardian *ad litem* were appointed to defend, and did defend, the suit, it is not, in the writer's opinion, the function of a court of equity to vacate the judgment, unless it is made to appear that the judgment was recovered in fraud of the ward's rights.

The demurrer admitted the truth of all of the allegations of fact well pleaded in the petition; those statements are sufficient to justify the relief prayed for; but, if the defendant in this action is permitted to answer, he may traverse those allegations and by proof establish the validity of his claim in whole or in part. In that event a court of equity should make its relief conditional upon the guardian doing equity by paying the reasonable value of the necessities furnished the ward, less any payments or just set-offs that may exist in the ward's favor.

Kinder v. Cushman Motor Co.

Neither the constitution nor any statute has abrogated the principles of equity in actions like the one at bar, and, if the district court is to aid the county court in vindicating its authority, it should go no further than it would in the case of any other creditor.

REESE, C. J., and LETTON, J., concur in this dissent.

LOTTUS P. KINDER, APPELLEE, v. CUSHMAN MOTOR COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,454.

Master and Servant: WAGE-CONTRACT: CONSTRUCTION. A written contract of employment provided that it "shall hold good only as long as both parties are satisfied," and that, if plaintiff continued in the employment for five years and produced certain specified results, he should have "a bonus of \$200," in addition to specified daily wages, and, "if the parties become dissatisfied," the employee "shall receive in proportion of the bonus of \$200 as he has worked of the five years." *Held*, That either party, if dissatisfied, could terminate the contract at will, and that, if the employer did so terminate the contract, the employee was entitled to a part of the \$200 proportionate to the portion of the five years that he had been in the employment.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Flansburg & Williams and Leonard Flansburg, for appellant.

R. S. Mockett, contra.

SEDGWICK, J.

The defendant employed the plaintiff under a written contract as follows: "We, Cushman Motor Co., party of the first part, and L. Kinder, party of the second part,

Kinder v. Cushman Motor Co.

agree as follows: That Cushman Motor Co. shall employ for five (5) years L. Kinder as foundry foreman. And L. Kinder agrees to work for the Cushman Motor Co. for wages as follows: \$3.50 a ten-hour day, and in addition to that a bonus of \$200 at the end of five years, provided at that time he is producing all castings not to exceed a cost of two cents a pound. This contract shall hold good only as long as both parties are satisfied. If the parties become dissatisfied, party of the second part shall receive in proportion of the bonus of \$200 as he has worked of the five years." He worked for the defendant under this employment for a little more than one year and nine months, and was then discharged by the defendant. He brought this action in justice court to recover \$70.20 under the last clause of the contract. The case was appealed to the district court for Lancaster county, where the plaintiff recovered a judgment for the amount claimed, and the defendant has appealed.

The defendant insists that it had a right to discharge the plaintiff if it became dissatisfied with his services, and that under the terms of this contract the company was under no obligation to show the grounds upon which its dissatisfaction rested. We think that this is the proper construction of the contract. The parties were neither of them under any disability, and were competent to make such contract as they saw fit to make. The provision is that the "contract shall hold good only as long as both parties are satisfied." When one party was dissatisfied, of course both parties were not satisfied, and the contract was at an end.

The defendant also insists that it was only in case both parties were not satisfied that the plaintiff was entitled to receive a proportion of the agreed bonus. The defendant admits that it was dissatisfied, and that, if the plaintiff had also been dissatisfied, he could have recovered the proportion of the bonus. The whole ground of the defense, then, is that the plaintiff was willing to continue in the employment. We do not think that the contract will bear

such interpretation. The clause, "If the parties become dissatisfied, party of the second part shall receive in proportion," etc., must be construed with the preceding clause, and as the contract continued only so long as both parties were satisfied, that is, it was abrogated and ended when that condition failed by either party becoming dissatisfied, the last clause must mean that, if the employment was ended because the contract was no longer satisfactory to both parties, then the plaintiff was entitled to a proportion of the agreed bonus. The defendant surely cannot complain of this, since it insists that it could terminate the employment at will by simply declaring its dissatisfaction with the contract, and, of course, by so doing absolutely prevent the plaintiff from earning the agreed bonus. It was a very reasonable provision of the contract that, in case the defendant should arbitrarily dismiss the plaintiff from employment, the plaintiff should have a proportion of the bonus. If the contract had continued for the five years, and the plaintiff had secured the full bonus agreed upon, it would be in effect an addition to his wages for the term, and, if he was arbitrarily discharged by the defendant during the term, it was reasonable that he should recover his proportion of wages. The defendant has so construed the contract in its letter to the plaintiff discharging him. That letter began with this language: "According to the contract between you and Cushman Motor Co., at any time either party is dissatisfied the contract becomes null and void." This being the proper construction of the contract, and it being admitted that the defendant exercised the option to terminate the employment, there could be no other verdict than the one rendered by the jury. Therefore any errors of law that might have been committed in the instructions to the jury were without prejudice to the defendant.

The judgment of the district court is right and is

AFFIRMED.

WALTER S. STRATTON, APPELLEE, v. MARTIN H. McDERMOTT ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,478.

1. **Quieting Title: NAMES: ESTOPPEL.** The surname and an initial letter may constitute the full name of an individual, and, when a grantee is so named in his title of record, it will not be presumed that he has another name. If he conveys the land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name.
2. ———: ———: ———. A deed was taken in the name of H. Emerson as grantee. It was duly recorded, and the grantee took possession of the land thereunder. There was nothing upon the deed record indicating that the grantee had any other name. In the meantime the county brought an action against H. Emerson and others to foreclose its lien for taxes which were delinquent for several years; the action proceeded to foreclosure and sale, and sheriff's deed issued, which it is stipulated also described him as H. Emerson. *Held*, That Emerson's grantee is estopped to allege, in an action to quiet his title against the purchaser at said sheriff's sale, that his grantor's true name was not H. Emerson.

APPEAL from the district court for Lincoln county.
HANSON M. GRIMES, JUDGE. *Reversed with directions.*

L. E. Roach and E. H. Evans, for appellants.

Wilcox & Halligan, contra.

SEDGWICK, J.

The plaintiff claims a quarter section of land in Lincoln county through a quitclaim deed from one Harrington Emerson. The defendants claim the land through sheriff's deed upon foreclosure of delinquent taxes. The question presented is as to the sheriff's deed. The trial court found the sheriff's deed invalid and entered a decree canceling it. The defendants have appealed.

Emerson held a mortgage on this land, which was duly

Stratton v. McDermott.

recorded, and in which he was described as H. Emerson. He foreclosed the mortgage in an action in which H. Emerson was plaintiff, and was so described in all of the proceedings in that foreclosure. He was the purchaser in the sale upon the foreclosure of his mortgage, and purchased the land in the name of H. Emerson, and received a sheriff's deed in that name. He recorded his deed and held the land under it for more than six years, and was generally known and did business in the name of H. Emerson. Having neglected to pay the taxes on this land, the county began foreclosure proceedings in September, 1900. In the title of the action in this petition for foreclosure he was named as "H. Emerson, first name unknown," and his wife was named as "—— Emerson, his wife, first name unknown." It is stipulated by the parties that in all subsequent proceedings he was named "H. Emerson." He was not a resident of this state at that time, and service was obtained by publication. In the affidavit for service and in the publication of the summons he was named H. Emerson, without any other name or description, as well as in the findings, decree, return of sale and confirmation. The defendant Martin H. McDermott purchased the land, and upon confirmation received a sheriff's deed in 1901, and has since that time been in undisputed possession of the land. About seven years thereafter the plaintiff obtained a quitclaim deed, executed by Harrington Emerson, and began this action to cancel the defendant's deed and quiet the plaintiff's title. The defendant answered, alleging substantially the above facts, and alleged that Emerson "took the said lands by deed of record and held the same under the designation of H. Emerson, and as such and by such name he is deemed to have taken, owned and held said described lands, and by none other, and the said H. Emerson, Harrington Emerson, and his or their grantees are estopped by law from denying that said lands were taken, owned and held by him, the said H. Emerson, under the name of Harrington Emerson or any other name, appellation or designation, and is further es-

topped from denying that notice conveyed to him, in accordance with the laws of the state of Nebraska, under the name of H. Emerson is not a good and sufficient service of process on him, the said H. Emerson or Harrington Emerson."

Under these circumstances, are Emerson and his grantees estopped to allege, for the purpose of vacating the tax foreclosure proceeding, that H. Emerson was not the true name of the owner of the land? Section 148 of the code provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant."

As there was no statement in the verification of the petition in foreclosure nor in the summons that plaintiff could not discover the true name, the proceedings were not under this section of the statute. It is a familiar rule, which has often been applied by this court, that a defendant must be sued by his true name "if the same is known or can be ascertained by the party suing him," and that the name of a person consists of a given name and a surname. *Enewold v. Olsen*, 39 Neb. 59. "Statutes creating a method for bringing a defendant into court without personal service are strictly construed, where actual notice may never reach him." *Butler v. Smith*, 84 Neb. 78. It has been many times held by this court that an action in which the defendant is sued in the initial letters of his name only is irregular, and in the absence of personal service no valid judgment can be rendered. *Enewold v. Olsen*, *supra*; *Butler v. Smith*, *supra*; *Herbage v. McKee*, 82 Neb. 354; *Gillian v. McDowall*, 66 Neb. 814; *McCabe v. Equitable Land Co.*, 88 Neb. 453; *McNamara v. Gun-*

derson, ante, p. 112. These cases, however, do not decide the precise question involved in the case at bar.

The plaintiff contends that H. Emerson, who held the title to this land, is one and the same person with Harrington Emerson, from whom he obtained the quitclaim deed. The evidence tending to show this identity, it is urged, is not satisfactory; but we prefer to consider the evidence as sufficient upon this point for the purpose of this discussion.

The trial court made special findings of fact upon the issues presented in the petition, but made no findings upon the allegations of the answer upon which the estoppel against the plaintiff is predicated. We are for the first time called upon to determine whether the plea of estoppel constitutes a defense in such an action. It appears that this precise question has been before the courts of our sister states and, so far as we have observed, such estoppel has generally been held to constitute a good defense. In *Blinn v. Chessman*, 49 Minn. 140, defendant George Chessman had taken title to land by deed in which he was named "George Cheeseman." The deed was recorded. A few years later he left the state, and an action was begun against him and another "to determine their adverse claims to the property." In that action he was named, as in the deed, "George Cheeseman," and service was by publication only. The matter determined by the court is stated in the opinion as follows: "The principal question here presented is whether that judgment against Cheeseman was of effect as to this defendant Chessman, as respects his title to the land." The opinion contains a satisfactory discussion of the question of estoppel in such case. It holds that the defendant, by taking title in that name and placing his deed upon record, put himself in a position so that "he cannot well complain that the name in which he took the title, and which he put forth to the world, by the records, as the name of the grantee, should be employed in proceedings instituted for an adjudication concerning that title." The opinion is

quoted quite at length by the supreme court of California in *Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17, a very recent case, decided in 1908. In that case the title to land was taken in the name of Louisa Munro, and the title deed was so recorded. The true name of the grantee, who was at that time an unmarried woman, was Madaline Louisa Munro. After this deed was taken and recorded, she married Mr. Emery, and still later an action to quiet title was prosecuted against her in which she was named Louisa Munro. It was claimed that the judgment against her obtained in that name was void and subject to collateral attack, but the court held otherwise, and discusses the question somewhat at length. The law governing the case is stated in the syllabus (97 Pac. 17) as follows: "If one takes title to land in any other than his true name, so far as that property is concerned, he has assumed the name in which he takes title, and he may be sued thereunder." The court cites, also, with approval *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922. This latter case appears to present substantially the same question as the one presented in the case at bar. In that case Richard O. Elting was the owner of the land involved. He had taken the patent from the United States in which he was named R. O. Elting. The patent was duly recorded, and afterwards an action was brought to enforce a tax lien in which the defendant was named R. O. Elting. The service was by publication. The question was as to the validity of the judgment in those proceedings. In that state it has been held that "publication addressed to Q. R. Noland was not sufficient to give the court jurisdiction of Quinces R. Noland" (*Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874), the same doctrine to which this court has adhered in many prior decisions. The court distinguishes the case then under consideration from the former case cited in these words: "There is this difference between this case and that one, and we think the difference is material: There, the recorded patent showed title in Quinces R. Noland; here, the patent which was recorded in Barton county, and

which was the only evidence of title on record, showed that R. O. Elting owned the land. It is by this name and description that he is known in his own title papers, and it is an admitted fact that he was a nonresident of this state."

It is insisted that in the case at bar the defendant was not sued by his complete name, nor in any complete name; that, although his surname is stated in full, only the initial letter of his Christian name was stated. There is no just ground for this distinction. The law does not forbid the use of letters as names. This court has several times recognized that fact. In *Oakley v. Pegler*, 30 Neb. 628, this court said: "Whether an apparently initial letter will be treated as a name must depend upon the manner in which the question is raised." And in *Scarborough v. Myrick*, 47 Neb. 794, the rule is stated to be: "In the absence of a showing to the contrary, it will not be presumed, for the purpose of invalidating a judgment rendered against a defendant, that he has any other Christian name than the initials by which he was sued." The court was considering a case in which the defendant had been named by initial, and it was held that the initial would be presumed to be his entire name, as the record "nowhere discloses that the defendant has any other Christian name than the initials by which he was sued." The supreme court of Colorado has discussed this point more fully, and in that discussion said: "Twelve authorities are cited in support of the proposition 'it is a presumption of law that every person has both a Christian and a surname.' No doubt that such is the legal presumption, but no authority is cited to show that 'M. H.' may not be the Christian name, and all there is of it." *Taylor v. Insley*, 7 Colo. App. 175, 42 Pac. 1046. The supreme court of Wyoming in *Perkins v. McDowell*, 3 Wyo. 328, 23 Pac. 71, said: "While it does not occur frequently, there are many instances where single letters constitute the only Christian name. We cannot, then, judicially know that the letters 'J. M.' are not a name, and, as the petition does not disclose that the

letters 'J. M.' are not the Christian name of the plaintiff, it follows that there is no defect apparent on the face of the petition in this respect."

We think that if one takes a title to real estate, and takes it in the name by which he is commonly known, and so records his title and holds possession and the use of the land under that record title, in an action to test his interest in the lands he may be named as he is named in his record title, and, if such action proceeds to judgment, he ought to be estopped to attack that judgment and the proceedings thereunder collaterally. A man's Christian name may consist of a letter only, and, if he is so named in his title of record, he ought also to be estopped in collateral proceedings to allege that the name so assumed is not his full name. *McCabe v. Equitable Land Co., supra*, and *McNamara v. Gunderson, supra*, are not inconsistent with this view. In the former the defendant was not sued in the name in which he held the title. In his deed he was named Rolland B. Ballard, and the action was against him in his initial only. The holding therefore in that case was in harmony with our former decisions. The latter case is clearly distinguished from the case at bar by the language of the opinion. It is said: "It is conceded that there is no element of estoppel in this case, and it is apparent that the record title to the land in question was in the railroad company at all times prior to the 5th day of November, 1906. Therefore the taxes which became delinquent and which were the basis of the foreclosure proceedings must have been assessed against that company. The record owner against whom the property was assessed was not made a party to the foreclosure suit." The defendant in the foreclosure proceedings had no title of record when that suit was begun nor until several years after final decree therein.

We think that in this case, under the facts stipulated by the parties, the plaintiff is estopped to say that the name in which his grantor took and held this land was not his true name.

gment of the district court is reversed and the
anded, with instructions to enter a decree dis-
e action at plaintiff's costs.

REVERSED.

J.

r in the conclusion for the reason that in my
ction 77 of the code applies, and not section 148.

following reasons, I dissent from the majority
The opinion, while professing to respect, actu-
ules, *Gillian v. McDowall*, 66 Neb. 814, and the
of decisions determined upon the authority of

ian v. McDowall, supra, a mortgagee was de-
his mortgage, which was recorded, as J. P. John-
sequently a Mr. Cunningham foreclosed a tax
the mortgaged premises, impleading Johnson as
nt, and describing him in the pleadings, process
edings as "J. P. Johnson." There was substi-
tute of summons; Johnson did not appear, his de-
entered, and a judgment rendered adverse to his
estate. In the reported case it was held that this
was void as to Johnson and his interest in the
cause he had not been sued by his true name. This
not be distinguished in a substantial particular
one at bar. The comprehensive declaration of the
the judgment was void includes a negative of
argument that might be advanced to sustain its

gislature recognized the common law upon the
amended by acts of parliament subsequent to the
ence of the colonies, by making few exceptions
eral rule that a natural person has one given and
me, and, if sued in a court of justice, should be
by that name. The first exception is contained
23 of the code, which is as follows: "In all ac-
n bills of exchange or promissory notes, or other

written instruments, whenever any of the parties thereto are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the first name or names, instead of stating the Christian or first name or names in full." This statute is practically the same as paragraph 12, ch. 42, 3 and 4 William IV, and evidences the intention of the legislature not to depart from beaten paths. Section 23, *supra*, does not authorize a plaintiff to implead a defendant by any other than his Christian name, except in the cases mentioned. *Elberson v. Richards*, 42 N. J. Law, 69.

Another exception is found in section 148 of the code, which provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown' and a copy thereof must be served personally upon the defendant." The defendant cannot invoke this statute for his protection because the county did not comply with its terms. There are no other exceptions in the code to the general rule, and they are good evidence that none other were intended unless granted by some other statute.

That this court is committed to that doctrine plainly appears from the discussion in *Butler v. Smith*, 84 Neb. 78. Our code was copied from the Ohio code, and upon a consideration of the sections of that code, identical with sections 23 and 148 of ours, the supreme court of that state held in *Uihlein v. Gladieux*, 74 Ohio St. 232, that substituted service of process against a defendant sued by a fictitious name is void, and that an allegation in the bill of particulars that the real name of the defendant is unknown is equivalent to a statement that the name em-

ployed is fictitious. The action in that case was at law, but the principle controls.

The action prosecuted by the county attorney was against "H. Emerson, first name unknown." This recital appears in practically all of the subsequent proceedings and is included in the sheriff's deed, so that all persons claiming thereunder knew that the owner of the real estate had been sued by a fictitious name.

The legislature, by authorizing the owners of certificates of tax sale to maintain an action against the land where its owner is not known, clearly indicated its intent not to further depart from the general rules in actions for the enforcement of tax liens. The law has been uniformly thus construed heretofore, and, if further exception is to be made, it should be authorized by the legislature. Of course, where the defendant appears or where process is served upon him personally, the reason for the rule fails, and decisions in those cases are without value in the instant one.

If the major premise in the majority opinion is accepted, the conclusion is not sound. That premise is that, where one accepts title to real estate by a name, fictitious or otherwise, he is estopped by the recitals in his deed to thereafter deny that his name is correctly stated therein. In other words, there is an estoppel by deed. A tax purchaser, however, does not claim under the former owner of the real estate, or under any deed other than the one executed by the individuals designated by law to convey, not the former owner's title, but an independent title to the grantee.

If, although the asserted estoppel is created by recitals in a deed, the uniform rules of law with respect to such estoppels are to be ignored, there is nothing in this record to create an estoppel. The action having been prosecuted by the county without an antecedent administrative sale was not authorized by law, although the decree could not be successfully assailed in a collateral proceeding. *Logan County v. Carnahan*, 66 Neb. 685. Harrington

First Nat. Bank v. Cooper.

Emerson was not responsible for the action; he was bound to anticipate that his land might be sold by administrative proceedings if he did not pay the taxes, or that after an administrative sale, but before deed, the holder of the certificate of tax sale might maintain an action against the real estate, but he should not be charged with notice that the county would maintain an action without legal authority whereby his land would be sold to pay that tax.

The record discloses that the defendant paid less than \$2 an acre for the land. This court has carefully protected the owners of real estate against tax deeds executed in administrative proceedings. Why should it look with indulgence upon tax deeds issued in actions not authorized by law? Why should it strain the principles of estoppel to take from the plaintiff his property and give it to a stranger?

The decree of the district court protects the defendant by requiring the plaintiff to pay all money invested by the defendant in the land, whether to satisfy the taxes or to pay for improvements made thereon, with legal interest; it does equity between the litigants, and respects the former decisions of this court, and should be affirmed.

FAWCETT and ROSE, JJ., concur in this dissent.

FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES, V.
FRANCIS D. COOPER ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,489.

1. **Appeal.** No appeal is allowed from findings of fact or conclusions of law. A party may appeal within six months after the entry of final judgment or overruling a motion for new trial.

Corporations: LIABILITY OF STOCKHOLDERS. Under section 136, ch. 16, Comp. St. 1891, the liability of stockholders upon the default of the corporation is limited to their unpaid subscriptions to capital stock, together with the amount of capital stock owned

by them. This applies also to liability accruing before the amendment of 1891.

8. ———: ———. In an action in equity to determine such liability of stockholders which accrued before the amendment of 1891 (laws 1891, ch. 13), the court entered a decree against them for an amount less than their statutory liability, and, after stating findings of fact, stated that the stockholders are jointly and severally liable for the full amount of judgments that had before that time been obtained against the corporation. *Held*, That this statement was merely a conclusion of law and erroneous, and that a judgment subsequently entered for a greater amount than the amended statute allows was also erroneous.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed*.

John C. Wharton and William Baird & Sons, for appellants.

Henry E. Maxwell and Will H. Thompson, contra.

SEDGWICK, J.

In February, 1892, the Omaha Brick & Terra Cotta Manufacturing Company was a corporation organized under the laws of this state, and as such had been doing business in Omaha for several years. The plaintiff, the First National Bank of Omaha, then began an action against these appellants and other stockholders of the said corporation, and alleged that it had before that time recovered a judgment against said corporation, and had caused an execution to be issued thereon, which execution was by the sheriff of said county duly returned unsatisfied for want of property whereon to levy, and alleged that the corporation had failed to comply with the requirements of the statute with respect to publishing notice of its indebtedness, and asked judgment against the several stockholders. The plaintiff, the United States National Bank of Omaha, and the Omaha Coke & Lime Company and others intervened and alleged causes of action similar to that of the plaintiff. The present plaintiff, Sunderland

First Nat. Bank v. Cooper.

Brothers Company, is the successor of the Omaha Coke & Lime Company. Such proceedings were had in that action that on the 21st day of March, 1893, upon hearing, the court found that there was due the plaintiff, the First National Bank, \$4,063.25, and to the United States National Bank \$2,900.45, and to the Omaha Coke & Lime Company \$447.50, and also made the following conclusion and finding: "That for the amount of said several judgments with interest and costs the defendants served with summons and in court, to wit (naming these appellants and others) are jointly and severally liable under the provisions of chapter 16 of the Compiled Statutes of Nebraska, as the same stood in the year 1888, but that, in the first instance, an assessment shall be made on the amounts of stock respectively held by each of said defendants for the purpose of raising a fund for the payment of the amounts due the plaintiff and those in interest with it in this action." The following decree was entered: "It is therefore considered, ordered and decreed by the court that said last named defendants be and are hereby ordered to pay into this court the assessments upon their said several shares of stock in the Omaha Brick & Terra Cotta Manufacturing Company in the sums and amounts following, to wit: * * * (naming the several defendants and the amount of the decree against each) and that for said several sums, with interest at ten per cent. per annum from March 21st, 1893, and costs of this action taxed at \$—, execution issue. * * * It is further ordered that this cause stand for further decree herein, in the event that said several defendants or any of them fail to pay the amounts herein adjudged to be paid by them and each of them." These appellants paid the amounts fixed and adjudged against them, but the defendants against whom there were larger amounts failed to make such payments. Afterwards several executions were issued and some smaller amounts collected, but nothing further was done in the hearing or trial of the case until the 26th day of October, 1908, when these plaintiffs filed a motion for judg-

ment in their favor, respectively, against the defendants as stockholders as before stated for the balance remaining unpaid upon their respective judgments against the corporation. Notice of this motion was given to these appellants and other defendants in the action, and upon the hearing the court entered an order sustaining the motion and a judgment against the defendants Alfred W. Phelps, Ernst Stuhlt, and William Kuhfall and other defendants in favor of the First National Bank of Omaha for the sum of \$8,418.51 and interest, and in favor of the United States National Bank for \$6,095.25, and interest, and in favor of Sunderland Brothers Company for \$927.01 and interest. The defendants last named have appealed to this court.

Prior to the amendment of 1891, the corporation law provided: "Every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given." Comp. St. 1889, ch. 16, sec. 136. By the act of 1891 (laws 1891, ch. 13) the liability so created was limited "to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individual." That act provided that the amended statute "shall be held and taken to apply in any case now pending or hereafter brought in any court in this state." It has been held that this amendment is constitutional, and that the recovery upon causes accrued under the old law should be limited by the provisions of the new. *Kleckner v. Turk*, 45 Neb. 176; *Hogue v. Capital Nat. Bank*, 47 Neb. 929.

In the first decree the amount of stock held by each defendant, respectively, was ascertained, and they were ordered to pay assessments thereon, which they did as has been already stated. These defendants, under the law as it then stood, were liable for an amount equal to the stock held by them, respectively, and their unpaid subscriptions, if any, but the court concluded that "for the amount of said several judgments with interest and costs the defendants served with summons and in court, to wit (naming them) are jointly and severally liable under the provisions of chapter 16 of the Compiled Statutes of Nebraska, as the same stood in the year 1888, but that, in the first instance, an assessment shall be made on the amounts of stock respectively held by each of said defendants for the purpose of raising a fund for the payment of the amounts due the plaintiff and those in interest with it in this action." It is now insisted that this was a finding and an adjudication against these defendants, and that the time for appeal therefrom having passed they cannot now question their liability for the whole amount of the original judgments. It was upon this theory that the judgments now appealed from were entered against them. The first decree entered against them was for a sum specified against each of them, and these sums have been paid. Their liability is limited by the act of 1891, and the court in entering a further decree should be limited by provisions of that act.

The findings of fact upon the first hearing were justified by the law and the record in the case. They support the decree that was then rendered thereon. There was no cause for appeal. The conclusion of law that the defendants were jointly and severally liable for the full amount of the judgments against the corporation was erroneous. It was not justified by the pleadings and findings of fact. The statute provides that an appeal may be taken "within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for new trial in said

Creighton v. Keens.

cause." Code, sec. 675. No appeal can be taken from findings of fact or conclusions of law. There must be a final judgment or decree ending the controversy, and adjudging a definite issue presented by the parties in the pleadings and evidence. The decree entered on the 26th day of October, 1908, was such an adjudication, and these appellants were entitled to the statutory time from the overruling of their motion for a new trial in which to appeal therefrom. This appeal was taken in due time, and neither the conclusion of law entered upon a former hearing, nor the decree finally entered, is supported by the pleadings and the findings of fact.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

JOHN H. CREIGHTON, APPELLEE, V. ALFRED KEENS ET AL.,
APPELLANTS.

FILED JUNE 13, 1911. No. 16,492.

Master and Servant: INJURY: ASSUMPTION OF RISK: NEGLIGENCE. Evidence examined and found to prove without substantial contradiction that the plaintiff, with full knowledge of existing conditions, assumed the risk, and that his own negligence was the proximate cause of the injury complained of. The judgment is therefore reversed.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

J. B. Strode, for appellants.

Guile & Guile, contra.

SEDGWICK, J.

The defendants were contractors, and took the contract to paint the inside walls of the First Presbyterian Church in Lincoln. The plaintiff is a painter by trade, and was

Creighton v. Keena.

employed by defendants in doing this work. While so employed, he fell and was injured, and brought this action against the defendants in the district court for Lancaster county to recover damages. Upon trial to the jury he recovered a verdict and judgment, and the defendants have appealed.

He alleged negligence on the part of the defendants as follows: "That it was the duty of the defendants to provide this plaintiff with suitable and proper scaffolding upon which to stand while doing the work for which he was employed, which defendants failed and neglected to do, and, in order to reach the interior of the gable of the said First Presbyterian Church, a temporary scaffold was erected by placing planks upon ladders, upon which it was necessary to use stepladders; whereas, had the defendants provided this plaintiff with suitable and proper scaffolding constructed by carpenters, it would not have been necessary for this plaintiff to have used the temporary scaffold complained of." He also alleged in his petition: "That, at the time plaintiff received the injuries herein complained of, he was in the exercise of due care and caution on his part, and that he was injured through the carelessness and negligence of the defendants in failing to furnish him with a safe place to work, and in not constructing a suitable and proper scaffold upon which this plaintiff could stand while so engaged as herein alleged."

The defendants in their answer admitted the employment and the accident, and alleged that "at the time of the injury complained of, and for a long time prior thereto, the plaintiff was in the employ of the defendants, and was familiar with the materials furnished by the defendants for the construction of scaffolds in places similar to the place where the accident occurred and the injuries complained of were received, and that plaintiff was familiar with the way scaffolds in such places were constructed, and that plaintiff superintended and assisted in the construction of the scaffold referred to in his petition as the one that fell and caused his injury, and defendants allege that

the dangers were obvious and apparent, and were known, or in the exercise of reasonable care ought to have been known, by the plaintiff, and that plaintiff assumed the risk of the dangers resulting in the injury complained of in the plaintiff's second amended petition. Defendants allege that said injury was caused by the negligence and want of ordinary care on the part of plaintiff, and was not caused by any negligence on the part of the defendants or either of them."

From the plaintiff's testimony it appears that he had worked as a painter and decorator for about 34 years, and during the last 25 years before the accident had followed that business in Lincoln. He had been in the employment of these defendants, or one of them, ever since "they had been in business." The defendants did not make a business of painting and decorating high walls and ceilings, and were not equipped for that work as those who follow that as special business are accustomed to be. The plaintiff testified that he was working with one Marsteller, who had recently been employed. The ceiling in the room in which they were painting was generally about 14 feet from the floor. There were, however, gables extending perhaps 4 or 5 feet higher. The defendants themselves were not present, and, so far as any one was in charge of the work, the defendants relied upon the plaintiff himself to direct the workmen. They all testified that they had "trestles" which stood 10 feet or 10½ feet from the floor. These appear to have been of an approved pattern, and would support a platform 6 or 8 feet wide. In order to reach the gables referred to, it was necessary either to use extension ladders, with which they were supplied, or to arrange a support some 4 or 5 feet higher than the platform supported directly by the trestles. The plaintiff and Marsteller, who was working under his direction, appear to have supported some planks at one end by one of the trestles, and instead of using a trestle to support the other ends of the planks they placed a stepladder there, and then upon the platform so formed they appear to have placed another

stepladder. The evidence is not very clear as to how this was arranged, but without doubt it was not satisfactory to the plaintiff. He testified: "I gave Marsteller orders to stand firm on the plank, but I don't think he did." Marsteller and another workman who was present testify that the cause of the accident was the using of the stepladder to support the planks instead of using two trestles, and that there was another trestle there that might have been used instead of the stepladder. The plaintiff himself upon this point was asked and answered as follows: "Q. If you had used the two trestles instead of one trestle and a stepladder, would the scaffolding have fallen? A. It might not. Q. It would have been safe to work on, then, if you had used the trestle, would it? A. I could not say it was safer than the other; it might have been more safer. Q. In your judgment, wouldn't it have been much safer than the platform you worked on? A. Well, I suppose it would. Q. Would have been very hard to have pushed that scaffolding as you did this one, if there had been two trestles under there instead of one trestle and a stepladder, would it not? A. Well, I suppose it might have been. Q. Isn't it your judgment now, Mr. Creighton, that if you had used the two trestles to build up your scaffolding instead of using one stepladder and a trestle this accident would not have happened? A. Yes, sir."

We see, therefore, that the plaintiff's own testimony established both defenses alleged in the answer without contradiction. He was perfectly familiar with all the appliances that were being used. He had more experience and was better qualified to judge of the danger of using them than were the defendants themselves. He planned these unstable supports and used them rather than to use the extension ladders, which the evidence shows without contradiction he might have used without danger. Whatever risk there was in so doing he clearly assumed upon his own responsibility. The evidence in regard to his own contributory negligence is equally conclusive. It is undisputed that there was another trestle furnished him

Sampson v. Ladies of the Maccabees of the World.

which he might have used instead of the unstable step-ladder as the foundation of his support, and he testifies himself that if he had done so the accident would not have happened. There was, therefore, no question of fact to be submitted to the jury, and under such circumstances the jury should have been instructed to render a verdict for the defendants.

The judgment therefore is reversed and the cause remanded.

REVERSED.

Root, J.

I concur on sole ground that plaintiff assumed risk.

TRUMAN SAMPSON, APPELLEE, V. LADIES OF THE MACCABEES
OF THE WORLD, APPELLANT.

FILED JUNE 26, 1911. No. 16,483.

Insurance: APPEAL: CONFLICTING EVIDENCE. The action is upon a benefit certificate of membership insuring the life of the member in the sum of \$1,000. There was a jury trial resulting in a verdict in favor of the beneficiary. The defenses presented were fraudulent representations in the application for membership, that the member committed suicide, which rendered the policy void, and that she died under the influence of a narcotic self-administered, which under the by-laws rendered the policy of no effect. The questions of fact were fairly submitted to the jury upon testimony which in effect was conflicting. *Held*, upon a review of the evidence, that the verdict could not be molested nor the judgment thereon be set aside.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

E. C. Strode, M. L. Learned and D. J. Flaherty, for appellant.

George W. Berge, contra.

REESE, C. J.

This is an action by the beneficiary named in a certificate of membership issued by defendant upon the life of Pearle Sampson for \$1,000, and in favor of plaintiff. The petition is in the usual form. The answer admits the corporate capacity of defendant as alleged in the petition; the issuance of the certificate of membership in plaintiff's favor in the sum of \$1,000 upon the life of the assured; that the assured died at the time alleged; and that all dues and assessments had been paid in full at the time of the death of the member. It is alleged that decedent committed suicide by the use of poison administered by herself with the intent to destroy her life, and that by the terms of the by-laws, which are set out in the answer, and which were known and accepted by decedent, it is provided that "no benefit shall be paid on account of the death of a member who shall die by her own hand, while sane or insane," or who dies or becomes disabled while under the influence "of drugs or narcotics self-administered, whether with suicidal intent or not." It is also alleged that in the questions propounded to her by the medical examiner she was asked if she had "received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental diseases," and that she answered "No," when in fact she had been confined in the Nebraska Hospital for the Insane at Lincoln in the year 1905, and upon the strength of this representation, which was believed and relied upon by defendant, she was admitted to membership in defendant, when, had she stated the truth, she would not have been so accepted; that the certificate was obtained by fraud; that by reason of the above facts she forfeited and waived all right to the payment of the benefit certificate. All averments of the petition not admitted are denied.

The reply is quite lengthy, consisting of specific denials of the averments of the answer and of the binding force of defendant's by-laws, or that they were a part of the

insurance contract. The allegations of false statements made in answer to questions by the medical examiner are denied, and it is alleged that the medical examination papers were prepared by defendant and its agent, were never given to the decedent to read, the answers being prepared by defendant's agent as she saw fit, and that decedent did answer all the questions truthfully and honestly, but the answers written by defendant's agent consisted of her own interpretation of the answers made by decedent and of which decedent had no knowledge; that the answers are not those of the applicant, but of defendant's agent; that the assured was prevented from knowing the contents of the paper which she signed, and a fraud was practiced upon her by which defendant is estopped to claim or assert that she did not answer the questions truthfully. It is denied that she was at any time insane or that she was confined in the hospital for the insane at Lincoln for the treatment of any disease, either mental or physical, but it is alleged that she was an orphan, destitute, and was in said hospital for rest only, and for a brief period, for want of another suitable place, and of which she advised defendant's agent and examiner at the time the examination was made. This is also presented as an estoppel against defendant.

A jury trial was had. At the close of the evidence the parties each moved for a directed verdict in their favor. Both motions were overruled, and the cause was submitted to the jury, the result being a verdict in favor of plaintiff for the amount of the policy and interest, upon which judgment in favor of plaintiff was rendered. Defendant appeals.

1. There is no question of error committed by the district court, either during the trial or by instructions; the whole contention of defendant being that the verdict and judgment is not supported by the evidence and is against the same. This contention involves three questions submitted to the jury: One was whether the decedent had "ever had a surgical operation performed, or received treatment in

a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental diseases?" In the investigation of this question, it was claimed by defendant that decedent had been insane and was confined in the hospital for the insane and had been treated therefor. In support of this contention, it was shown that she had been charged with being insane, had been examined by the board of insanity of Cass county and found so to be, and had been committed to the hospital as an insane patient. On the other hand, it is contended that she never was insane, but that, by reason of a serious and depressing disappointment, she had become temporarily hysterical, and in that condition was sent to the hospital, where her excitement passed off in a very few days without special treatment, and, by the rest which the hospital afforded, her nervous excitement disappeared and her condition was normal. Upon this subject there was a sharp conflict in the evidence. The records for the hospital for the insane are contained in the bill of exceptions. By them the following facts appear: She was admitted to the hospital September 12, 1905. "Diagnosis—acute mania. Remarks: Received in ward 4. Was noisy and resistive. Given two teaspoonfuls of bromo-chloral at bedtime. September 13: Fell from her chair this morning, but apparently was hysterical only. Has been very much afraid and starts and gets out of reach if any one attempts to touch her. Is not rational, but calls for 'Mama' and 'Guy'. * * * September 15: Has been quiet and rational and was transferred to ward 3. Wants some work to do. September 20: Remains quiet, rational and self-controlled. Is working in the sewing room. September 25: Transferred to ward 2. Quiet. Helps in sewing room. Cheerful. October 14: This morning patient, who has remained well mentally, complained of being cold and was found to have some fever. Gave a history of epistaxis a few days earlier. That her bowels had not moved for four days although she had taken salts. Tenderness in right iliac region. Transferred to ward 5

and given calomel—3 grains. October 17: Diagnosis made of appendicitis. Widal test negative. October 22: It has been decided not to operate unless constitutional symptoms increase. October 31: Temperature normal. Pain and tenderness gone. December 30: Well and strong. Helps in laundry. 1906, February 15: Continues well. Is cheerful and apparently well mentally. April 16: Lost a pair of scissors a few days ago and has been kept upon ward in consequence. Health and mental condition good. April 24: Paroled. August 1, 1906: Discharged. Recovered."

Taken for what it is worth, this shows, probably substantially correctly, the history of the patient's condition during the whole time she was in the hospital. If the record be a true one, it is shown, as claimed by plaintiff, that her nervous and excited condition disappeared between the 12th and 15th of September, probably in three days' time, and there are no other indications of mental aberration during the whole of her stay in the hospital, unless the loss of the scissors may be so accounted for. We presume that that fact could hardly be maintained. She seems to have suffered at one time from the effects of constipation and something of an attack of bleeding at the nose. Otherwise her health was good. Taken in connection with the other evidence that her only ailment was hysteria and temporary nervous excitement, we are not prepared to say that the verdict finding the answer to the question was not so far unsupported as to be said to be untrue. So far as is shown, her recovery from the nervous tension would have resulted as quickly had she remained at home as in the hospital. Having no parents and no home but that of her uncle, she seems to have been content to remain where she was. Presumptions are in favor of sanity.

2. As to the process of examination for admission to the order, not much can be said in favor of its fairness. The attention of Miss Sampson was not specifically called to the questions, many of which were in quite fine print,

Sampson v. Ladies of the Maccabees of the World.

and, as the examiner testified, she herself wrote down "the sum and substance" of the answers, the examiner thus writing her own conclusions by "Yes" or "No." The examination is shown to have been perfunctory, the applicant not having had the opportunity to read over the questions, answers, statements and "warranties" which would have taken considerable of time. The law does not presume fraud in the examination, and, as the alleged insanity was considered by the jury, they must have found that neither the insanity nor the fraudulent representations were proved.

3. The next contention is that Miss Sampson committed suicide, and therefore the policy was forfeited. The sections of the by-laws bearing upon this subject we have quoted above. Did Miss Sampson die by her own hand? We think the evidence quite clearly establishes the fact that in a sense she did, but whether the result proved to be as intended by her may have been a matter not free from serious doubts in the minds of the jury. It cannot be that the section of the by-laws under consideration should be held to mean exactly and fully what the language expresses. The section bears the head-note "Suicide." Suicide in law is the act of taking one's own life voluntarily and intentionally—self-murder. Webster's New International Dictionary. This must be accepted as the sense in which the language of the by-law is used. If Miss Sampson took one tablet of hyoscine (a common and reasonable dose, and which, as testified, can usually be taken safely and without danger) without any intention of injury to herself, and the results turned out to be unexpectedly disastrous, we do not think the cause of her death could furnish a defense to a suit on the policy. It was shown by the evidence, and it is within common knowledge, that the action of remedies which are counted innocent, and are commonly used, may produce different effects upon persons differing in temperament and physical condition. The only evidence aside from symptoms that she took hyoscine at all is furnished

by her statement that she had taken one tablet of the medicine, which, as we have said, was a common, ordinary dose for the relief of nervousness, and to produce sleep. She had been employed as an undergraduate nurse in one of the principal sanitariums in Lincoln, and was familiar with the use of the drug and its effect upon the human system. She had some medicines with her and a box containing instruments. She is spoken of in the evidence as a nurse, and therefore the possession of the medicines in use by physicians and nurses is not of itself convincing evidence of a purpose to use them improperly. She was in a high state of nervous excitement resulting from a distressing disappointment, and for two or three days had been almost constantly weeping and unable to sleep, and was suffering from a headache. In the afternoon of the day before the night upon which she died, she had instructed the family with whom she was sojourning not to awaken her for dinner should she be asleep when that meal was ready to be served. When the meal was prepared, a messenger went to her room to call her if awake, but, finding her asleep, she was not molested. Later she was found to be awake, when she declared she was feeling well, her headache had left her, and she was comfortable and cheerful. This was in the early part of the night. She stated that she had taken a tablet of the hyoscine, and requested that the vial containing the remaining tablets be removed. Thereafter she became flighty, indulged in singing a song, would fall asleep, apparently, for a few minutes, and upon waking would seem somewhat delirious. Her symptoms grew alarming, and a physician was called in, who found her beyond aid, and about one hour after midnight she died. During the afternoon of the day before, she wrote a letter to her former fiance referring to the shock and sorrow she felt from being turned down, as she expressed it, referring to some articles of more or less value which she gave him, and in rather unmistakable terms indicated an intention to end her life. The lady with whom she was staying was

in the room occupied by her during the afternoon, but, on being called down to answer the telephone in a lower room, left her, but, on returning to the upper room, found Miss Sampson standing at the head of the stairs, with the letter and a small box of jewelry, etc., in her hand, prepared to go downtown. Upon a promise that both could go later on, she returned, tore up the letter, and remained in her room until her death as above stated. No post-mortem examination was made. The physician who attended her at the time of her death testified that in his opinion she died from hyoscine poisoning, which was probably correct, but not of itself conclusive of the theory of suicide. Without a further discussion of the evidence, we may say it is the opinion of some of the members of the court that Miss Sampson was never insane, and that she did not commit suicide; that is, intentionally take her own life. It is the opinion of others, and in which the writer coincides, that, had the question of suicide been submitted to them in the first instance as the triers of fact, they would have believed from the evidence that she did intentionally take her own life, but that there is sufficient evidence to the contrary to justify the submission of the question to the jury, and, the burden of proof being upon the defendant to establish the defense, the finding of the jury cannot be set aside. As the death was not by violence, as by shooting, cutting, hanging, or the like, many of the indications of self-murder are wanting. The jurors heard the evidence, saw the witnesses, and no doubt arrived at a conscientious verdict.

The by-laws of defendant provide that no benefit shall be paid on account of the death of a member "who dies * * * under the influence of drugs or narcotics self-administered, whether with suicidal intent or not." It is insisted that hyoscine is a narcotic (which is true), and that Miss Sampson died "under the influence" of the medicine "self-administered" (which is perhaps also true), and therefore plaintiff cannot recover. This contention is based on the strict wording of the by-law. In

the interest of our common humanity, the writer hereof, for himself alone, refuses to give his assent to the construction of this section as contended for by defendant, and, did he do so, he would not hesitate to say that such a provision would be against public policy and void. We are persuaded that no one could be found who would contend that were a person suffering the excruciating agonies which often precede death from accident, as by burning and such like, and should "self-administer" a narcotic or opiate without "suicidal intent" in order to obtain relief, and while under the solacing influence of the medicine should die from the injury, an insurance policy on the life of the person would thereby become void. However, this question does not necessarily arise under the issues in this case. The defense presented in that behalf by the answer is as follows: "Further answering, defendant represents and shows unto the court that the said Pearle Sampson died from the effects of hyoscine, hydrobromide, and other poisons self-administered and with suicidal intent, and that by said act of self-destruction she thereby forfeited all rights under said certificate of insurance, as section 414 of defendant's by-laws, which are a part of the insurance contract and govern the plaintiff's rights thereunder," etc. By this it will be seen that the defense presented is that the alleged poisons were self-administered "with suicidal intent" and that by "said act of self-destruction" she forfeited all rights under the policy, thus limiting the defense to the *intentional* self-destruction of the assured. The questions of suicide and "suicidal intent" were submitted to the jury, and their verdict negatives the idea that the decedent intentionally committed suicide.

All questions of fact involved in this case were properly submitted to the jury, and they have decided the matters in dispute, and we find no warrant to interfere with their finding.

The judgment of the district court is therefore

ROOT, J., not sitting.

AFFIRMED.

Russell v. Haines.

**ELLEN RUSSELL ET AL., APPELLEES, V. MILES B. HAINES,
APPELLANT.**

FILED JUNE 26, 1911. No. 16,516.

Mechanics' Liens: SUIT TO CANCEL: EVIDENCE. In an action to cancel a record of the filing of a mechanic's lien for the construction of a building upon real estate, it was alleged that the lienor had been fully paid, and there was nothing due, and the lien cast a cloud on plaintiffs' title. In the answer the defendant claimed that the lien was valid, that the amount named in the statement for the lien was due, and sought a foreclosure thereof. The evidence is examined, the substance thereof is set out in the opinion, and it is *held* that it is not shown that the finding of the district court in favor of the plaintiffs is not sustained by the evidence.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Lafe Burnett, for appellant.

John M. Stewart and D. H. McClenahan, contra.

REESE, C. J.

This action was instituted by plaintiffs for the purpose of removing an alleged cloud cast upon their title to real estate, described in the petition, by the filing of a statement for a mechanic's lien thereon in the office of the register of deeds of Lancaster county. It is alleged in the petition that plaintiffs and defendant had entered into a contract in August, 1907, by which defendant had agreed to furnish material and construct a dwelling-house and certain outbuildings for plaintiffs for the sum of \$1,075; that the buildings were constructed, but defendant had failed to pay for the labor and material employed in their construction, and plaintiffs had been required to pay for the same to an amount exceeding the contract price by the sum of \$144.73, and nothing remained due defendant thereon; that defendant had wrongfully filed his claim

in the mechanic's lien record of the county for the sum of \$242, alleged to be due for 60½ days' labor at the price of \$4 a day. The purpose of the action is as above indicated. Defendant answered, in effect admitting the making of the agreement, which was oral, to construct a dwelling-house, the same to be a duplicate of one being then constructed in the neighborhood, for the sum of \$1,075; denying that any outbuildings were provided for in the contract; alleging that plaintiffs had rescinded the contract, changing it in many particulars, and required much more to be done than was provided for in the original agreement and at much greater cost. The alleged changes are set out in the answer, but they need not be here noticed. The filing of the mechanic's lien is admitted, and it is alleged that the sum of \$207.97 is still due defendant, and for which he asks a foreclosure of the lien. The reply is a general denial of all allegations of the answer, except those which admit the averments of the petition. A trial was had to the district court, which resulted in a finding in favor of plaintiffs and a decree canceling the record of the mechanic's lien. Defendant appeals.

There is no question of law involved. The whole controversy is upon questions of fact. The evidence is in sharp conflict upon every material issue. If plaintiffs' version of the contract and transaction is the true one, the contract price has been overpaid, and the decree is correct. If defendant's contention is correct, the decree should have been in his favor. A careful reading of the bill of exceptions has not impressed us with the reliability of the testimony of the parties on either side of the controversy, yet we presume each told the truth as they understood the facts to be. The case presents a strong illustration of the folly of entering upon such undertakings without reducing the contract to writing.

It is conceded that an oral agreement was made by which defendant undertook to furnish the material and construct a duplicate of another dwelling-house, but that other building was not yet completed. It was not fully

State v. Furse.

inclosed, and therefore not painted. The cellar was not bricked up, nor were the outhouses, consisting of a coal-house and toilet, built. Defendant now claims that his contract did not include the cellar walls, the painting of the house, nor the construction of the outhouses. Some changes were made in the dwelling-house as the work progressed, but each party claims that all changes from the plan of the house adopted as the model were made upon the will of the other; plaintiffs claiming that they were made without their consent, orders or agreement, while defendant insists they were made under the express commands of plaintiffs. The whole business was conducted in a slipshod, careless, and unsatisfactory manner. The method of payment pursued by the parties for material and labor renders it impossible for us to state the account between them, even if they could agree upon the contract, the cost of extras and changes. The husband of one of the plaintiffs was 94 years of age, and well-nigh deaf. He testifies in the most positive terms that he had nothing to do with the making of the contract, or in ordering changes, yet defendant testifies to conversations with him which contradict his statements.

Upon consideration of the whole case, we think that the judgment of the district court must be, and it is,

AFFIRMED.

STATE, EX REL. PETER MORTENSEN, V. WILLIAM J. FURSE.

FILED JUNE 26, 1911. No. 17,019.

1. **Officers: FILLING VACANCIES.** Under the provisions of section 20, art. III of the constitution of this state, vacancies in offices created by that instrument must be filled in compliance with the provisions of the general law upon the subject of filling vacancies, when no provision is made for that purpose in the constitution.
2. **Constitutional Law: AMENDMENTS TO CONSTITUTION.** When an amendment to the constitution is legally adopted, it becomes a

part of that instrument, and in its application to subsequent transactions must be considered precisely as though it had been originally adopted as a part thereof in its amended form.

ORIGINAL application in the nature of *quo warranto* to determine the right of respondent to the office of state railway commissioner. *Demurrer to petition sustained.*

J. B. Strode and E. J. Clements, for relator.

Albert & Wagner, contra.

REESE, C. J.

Relator filed his information in the nature of *quo warranto* in this court in the exercise of its original jurisdiction against defendant William J. Furse, in which, in addition to that of relator's eligibility, it is alleged, in substance, that on and prior to the 16th day of October, 1910, one William Cowgill was and had been duly elected and acting as one of the state railway commissioners of this state; that on the said 16th day of October he died, and his office then became vacant; that thereupon relator was duly nominated by petition as a candidate for said office to fill said vacancy; that the fact of the death of said William Cowgill and of the vacancy in the office caused thereby and of affiant's nomination to fill said vacancy were published in the various state and county papers throughout the state, and thus became matters of general knowledge to the people of the state on and before the ensuing election; that the secretary of state thereupon duly certified the name of relator as nominee for said office to the county clerk of each county of the state, and relator's name was duly printed upon the sample and official ballots used and cast at the general election (held on the 8th day of November, 1910) in nearly all of said counties; that at said general election there were cast 79,088 votes for the office of state railway commissioner to fill said vacancy, all of which said votes were received by relator; that said votes were duly certified to the secretary of state,

and by him to the speaker of the house of representatives, who, in accordance with law, on the 5th day of January, 1911, in the presence of both houses of the legislature then in session, opened and published the returns of the election of executive state officers when it was found and officially announced that relator had received 79,088 votes for railway commissioner to fill the unexpired term, there being no other votes cast or canvassed for said office; that thereupon relator accepted said office, qualified by taking the prescribed official oath, and filed said oath with the secretary of state; that on the 7th day of November, 1910, the governor appointed defendant William J. Furse to said office to fill said vacancy until the next general election after his said appointment, when defendant qualified, took possession of the office, and entered upon the duties thereof; that, notwithstanding relator's election and qualification and his desire to discharge the duties thereof, the defendant continues to hold said office and to usurp the same, and refuses to surrender to relator. The prayer is for judgment that defendant is not entitled to hold said office, that he be ousted therefrom, and that relator be installed therein.

To this information defendant has filed a general demurrer, the grounds therefor being that the facts stated in the information are not sufficient to constitute a cause of action, are insufficient to entitle relator to the relief prayed for, and are not sufficient to sustain a judgment of ouster. The case has been briefed and argued upon the demurrer and the questions of law presented.

The decision depends upon whether the clause or provision in section 1, art. VIII, ch. 72, Comp. St. 1909, providing that "the governor shall fill all vacancies in the office of railway commissioner by appointment, and the persons so appointed shall fill said office until the next general election after his said appointment," is to be held as complete within itself and exclusive of all other laws upon the subject of filling vacancies in said office by the governor, or whether, if valid, it is to be considered in

connection and *in pari materia* with the provisions of chapter 26, Comp. St. 1909, upon the subject of vacancies in office, and the filling of the same. By that chapter (section 103) it is provided that vacancies in state offices, except reporter of the supreme court, shall be filled by the governor where no other method is provided. By section 105 appointments "shall be in writing, and continue until the next election at which the vacancy can be filled and until a successor is elected and qualified, and be filed with the secretary of state." By section 107 it is provided that vacancies occurring in any state office "thirty days prior to any general election, shall be filled thereat." If this law is to be applied to the present case, since the death of Mr. Cowgill occurred less than 30 days prior to the next general election to be held November 8, of the same year, there would seem to be no question but that the appointment of defendant would continue until the next succeeding general election, which would be in November, 1911.

It is argued by relator that the provision of section 1, art. VIII, ch. 72, Comp. St. 1909, which we have herein above quoted, is complete within itself, containing all that is necessary for the guidance of the governor in filling the vacancy, and was not intended by the legislature as having any connection with, or relation to, the then existing law. Upon the other hand, this theory is combated by defendant for the reason that, if this should be held to be true, it cannot be applied, because the provision for filling vacancies is not within the title to the act, and is unconstitutional and void. This contention is not without reason in its support; but, as we view the questions involved in this case, we do not deem it necessary to pass upon that point, and it will not be decided. Should we hold that provision void as unconstitutional, we would have only what is contained in chapter 26, *supra*, as conferring authority upon the governor to make the appointment. Should we hold the provision valid, and that the two are *in pari materia* and to be construed together, the result would be

the same, except that it would appear that the legislature, by the quoted clause, intended to remove all doubt by recognizing the power of the governor to act. Should we hold that clause valid and exclusive, we would have to hold that, had Mr. Cowgill died three days before the election and the governor had filled the vacancy one day before the election, as he did in this case, and upon a petition being filed and the information given to the people of the state generally, as alleged in the petition, the appointment would only hold "until the next general election after his said appointment," which would be the next day. If no part of chapter 26 is to be applied, the appointee could not hold "until a successor is elected and qualified," and the direction that the written appointment should be filed with the secretary of state would have no application.

What about these details? If we cannot take them from the law as it existed prior to the enactment of the railway commission law, we are left without a guide. We agree with counsel for relator that the office of railway commissioner is, under the constitution, to be classed as an executive office. Of this we think there can be no doubt, as it can neither be said to be legislative, nor judicial, and the three classes are the only ones given by that instrument. *In re Railroad Commissioners*, 15 Neb. 679. The fact that railway commissioners are not provided for in the constitution until the amendment thereof by the adoption of the joint resolution of 1905 can make no difference, since the language of the constitution in the classification of the departments of the state government is broad enough to include all offices thereafter created, whether by the amendment of that instrument or by legislative enactment. The office under consideration being an executive office, and the clause contained in the railway commission law not providing for the details of appointments to fill vacancies, we must hold that, if valid, it must be treated as providing only in a general way that the duty of appointing a temporary successor to a deceased member of that commission devolves upon the governor, and con-

strued in connection with the existing law upon that subject, and therefore the power to elect a successor at the next general election does not exist unless the vacancy occurs "thirty days prior to any general election." If that length of time does not intervene, the vacancy must be filled by appointment, "and the person so appointed shall fill said office until the next general election after his said appointment."

In support of the contention by relator that the quoted clause in the railway commission law is exclusive upon the subject of filling vacancies in the office of such commission, we are cited to *State v. Walker*, 30 Neb. 501, and *State v. Rankin*, 33 Neb. 266. Judging by the syllabus of the former case, there was but one question before the court for decision, which was whether the appointment of a county attorney to fill a vacancy in that office was sufficiently made by entering the fact upon the records of the proceedings of the board, and failing "to make, sign and file with the county clerk a written appointment, separate and distinct from the record of their proceedings." It was held that, as the county clerk was the custodian of the records of the county board and such records were kept in his office, there was a sufficient compliance with the law. The discussion of the manner of filling vacancies as provided by section 105 of the election law seems to be aside from the true question involved, and we are unable to see how it can be said to control this case.

While we do not think that, were the questions decided in the latter case (*State v. Rankin*, 33 Neb. 266) before us in the first instance, we would have agreed to all that is said in the opinion, yet it seems to us that this case is to be distinguished from that one. However, it is our opinion that the general law providing for the filling of vacancies was intended as a regulation for all vacancies, and the fact that an office is created after the enactment of the law would be as much within its provisions as though it existed at the time the general law was passed, unless full provision were contained in the law creating the office.

To the holding that the appointee would hold until the expiration of the term for which the original incumbent was elected, without reference to how many general elections should intervene, unless specially so provided by the creating statute, we cannot give our assent. If such is the law, it would make no difference how long the unexpired tenure of office, the appointee would hold until the end of the term, which might be any number of years, notwithstanding the fact that a half dozen general elections intervened. This is so directly opposed to the spirit and policy of the state government as to challenge its correctness. It is the known policy of the state and its laws to permit the people to elect those who are to serve them as their officers. Hence the requirement that, if 30 days or more intervene between the occurrence of the vacancy and the next general election, the remainder of the term shall be filled by election. To hold that a general law can be applied only to conditions as they exist at the time of its enactment would be subversive of all rules of construction. The only provision in the law creating the office of county attorney for the filling of a vacancy in the office is that the county board shall appoint a successor who shall give bond and discharge the duties of the office until his successor shall be elected and qualified. This left all other details to be governed by the general law providing for filling vacancies. To the mind of the writer nothing could be plainer. The conclusion of the writer of that opinion is that, "the lawmakers having specially provided the method of filling vacancies in said office, the only conclusion we can reach is that it is exclusive of all others." This would be true had the legislature done so, but the application should be limited to what the lawmakers did, which was that the county board should appoint and the appointee should hold the office until the election and qualification of "his" successor. All other matters are left to the general law.

However, it is our opinion that a distinction can be drawn between that case and the present one by reason

of the fact that the provision for the filling of vacancies in the office of county attorney is contained within the act creating the office, and for that reason the decision might be sustained, while in this case the office was created by the constitution, and by virtue of that instrument the general law for filling vacancies should be applied. Section 20, art. III of the constitution, provides: "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind. And the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this constitution." It must be conceded that no provision is made in the constitution for the filling of a vacancy in the office of railway commissioner; it being silent upon that subject. The case is therefore brought within the provisions of the constitution last above quoted and must be governed by it, and the general law applied. The fact that the office of railway commissioner was created by a subsequent amendment to the constitution can make no difference, for, when adopted by the people, it becomes as much a part of that instrument as if contained therein when first adopted. In its relation to matters which have arisen subsequent to the adoption of an amendment the constitution must be construed as a whole, all of whose provisions are of equal validity. 4 Ency. U. S. Supreme Court Rep. 48. It is believed that the same rule should be applied as to an amendment of a statute, and we held in *Cass County v. Sarpy County*, 63 Neb. 813, that "an amended statute is to be construed, in its application to subsequent transactions, precisely as though it had been originally enacted in its amended form."

It follows that the demurrer to the petition must be, and is, sustained.

DEMURRER SUSTAINED.

SEDGWICK, J., not sitting.

Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.

**SUNDERLAND BROTHERS COMPANY, APPELLEE, v. CHICAGO,
BURLINGTON & QUINCY RAILWAY COMPANY, APPEL-
LANT.**

FILED JUNE 26, 1911. No. 16,485.

- 1. Carriers: TRANSPORTATION OF FREIGHT: LIABILITY.** The general rule is that a common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God or the public enemy.
- 2. ———: DESTRUCTION OF GOODS: ACT OF GOD: CONCURRENT NEGLIGENCE.** If the carrier needlessly delays the shipment or negligently fails to protect it from known or threatened danger, and the goods are overtaken in transit and are damaged or destroyed by an act of God, and such negligence or unreasonable delay is the proximate or concurring cause of the injury or destruction, the carrier is liable for the loss; and this rule applies whether the goods are perishable or nonperishable in their nature.
- 3. ———: EXCESSIVE RATES: EVIDENCE.** Evidence examined, and *held* insufficient to sustain that part of the judgment which is based on an alleged excessive freight charge.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed on condition.*

Greene & Breckenridge, for appellant.

Baldrige, De Bord & Fradenburg, contra.

BARNES, J.

The plaintiff commenced an action in the district court for Douglas county against the defendant, a common carrier, to recover damages for negligence and delay in the transportation of 12 car-loads of lime, which plaintiff alleged caused its destruction by the flood of June, 1903, while in the defendant's yards at Kansas City, Missouri. Plaintiff also commenced another action against the defendant to recover the amount of an alleged overcharge or excessive rate charged and collected for the transportation of certain cement from Hannibal, Missouri, to South

Omaha, Nebraska, in June and July, 1906. The actions were consolidated and tried together. The plaintiff had the verdict on both causes of action, and from a judgment on the verdict the defendant has appealed. The appeal is presented as though the record contained two cases, one designated as the flood case and the other as the rate case. We adopt the defendant's classification, and will consider the questions in the order in which they have been presented.

In the flood case, it is contended that the district court erred in refusing to direct the jury to return a verdict for the defendant at the close of all of the evidence. It appears that in May, 1903, the plaintiff purchased of the Western White Lime Company 12 car-loads of lime, put up in barrels and delivered to the purchaser f. o. b. the cars of the Saint Louis & San Francisco Railroad Company, commonly called the "Frisco" line, at Ashgrove, with express instructions from the plaintiff that the same be routed to its destination by way of Kansas City, and over that part of defendant's railroad known as the "K. C." line. Three cars of this lime were delivered to the defendant at its yards in Kansas City, Missouri, on the 26th day of May, 1903, and the remaining nine cars were delivered to and received by the defendant at that place from May 26 to May 30, inclusive; that during the time of such delivery the country drained by the Kaw river and its tributaries was being flooded by heavy rains, which continued from day to day until the 31st day of May, at which time an unprecedented flood of water reached Kansas City, completely flooding the defendant's yards, in which all of the cars of lime were situated, and which resulted in its complete destruction. The trial court instructed the jury that the flood above mentioned was so great, unprecedented and unusual as to amount to an act of God, and that, in order to entitle the plaintiff to recover, it was required to show that some act of negligence on the part of the defendant, which, concurring with the act of God, was the proximate cause of the loss and damage complained of.

Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.

It is contended, on the part of the defendant, that it was not guilty of any negligence, and that under the circumstances, as disclosed by the testimony, it was not chargeable with negligence in failing to seasonably forward the lime to its place of destination, and thus escape the flood above described. It appears, however, that as early as May 25 the weather bureau forecaster at Kansas City sent out warnings to the people and the railroad officials of the approach of the flood. This it continued to do from day to day and time to time, and on the 29th day of May the following warning was prepared on postal cards and mailed to all points between St. Joseph and Boonesville, Missouri. "May 30, 1903. Stage of Missouri river at 7 A. M. at Kansas City 25 feet and still rising. This is more serious than the flood of 1892, and only about one foot below the stage of 1881. Heavy rains in Missouri and eastern Kansas last night renders the situation more alarming for points below Kansas City." The transportation companies were also warned that it would be well for all interested to be prepared for emergencies. On May 31 it was stated by the weather forecaster at Kansas City: "No reports of any kind received. Cut off from telegraphic and telephonic communication except to the eastward. Nothing could be said except what was actually happening in this vicinity." Warnings were sent out to the heads of the railroads informing them of the increasing danger as early as May 28, stating that interests affected by high water should be closely guarded. It is admitted that those warnings were received by the officials and employees having supervision and charge of the traffic of the defendant's road at Kansas City. Notwithstanding such warnings and the daily newspaper reports of the magnitude of the approaching floods, the defendant took no steps to remove the cars containing the lime in question to higher ground, and failed and neglected to forward them to their place of destination, or in any manner remove them from flood danger. It appears that the traffic between Kansas City and Omaha by way of the Kansas City line was interrupted

for some of the time in question by washouts at or near St. Joseph, but it also appears that the defendant forwarded freight amounting to some 30 or 35 cars a day of what it called perishable goods from Kansas City to Omaha, and that it could have routed the lime in question by way of Chariton, Iowa, to its place of destination. Again, it is well known that by exposure to floods white lime is of a most perishable nature.

From the foregoing it appears that this case is fairly within the rule announced in *Wabash R. Co. v. Sharpe*, 76 Neb. 424, where the facts were practically the same as those in the case at bar. It there appeared that one Sharpe delivered to the railway company at La Fayette, Indiana, some household goods for shipment to Lincoln, Nebraska. The goods were shipped from La Fayette on the 21st day of May, 1903, and were delivered to the Missouri Pacific Railway company, the connecting carrier at Kansas City, on the 26th day of May, which was the same day that the first three cars of the lime in question herein were delivered to the defendant. The household goods were held in the yards by the Missouri Pacific Railway Company until May 31, when they were injured by the same flood that destroyed the plaintiff's lime. Action was brought to recover the value of the goods; the plaintiff had judgment, and on appeal to this court it was said: "It is claimed by the railroad company that they shipped the goods within a reasonable time, and delivered them to the connecting carrier at Kansas City in good condition. This may all be true, and still it is no answer to the plaintiff's claims. The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, excepting only the act of God and the public enemy. The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a *prima facie* case against the carrier. It then devolves upon it to show that the loss or damage was caused by the act of God or some other cause which would exempt it from liability. It may be conceded in

the present case that the flood by which the goods were practically destroyed was an act of God, which, under ordinary circumstances, would relieve the company; but we think the rule supported by the weight of authority is that a common carrier is responsible for injury to goods by act of God, if he departs from his line of duty, and while thus at fault, and in consequence of that fault, the goods are injured by an act of God which would not otherwise have produced the injury. Or, as stated in one of the cases, a common carrier is responsible for injury to goods by the act of God where the goods were exposed to injury by the carrier's inexcusable detention." In the instant case it would seem, in the absence of any reasonable showing to the contrary, that the delay of five days or more in the yards at Kansas City was an unreasonable delay in the transportation of the plaintiff's lime, and, when we consider the evidence that the officer in charge of the weather bureau at Kansas City from May 25 to May 31 daily and frequently notified the public and the railroad companies of the coming flood, of the constant and increasing rains throughout the territory drained by the Kaw river, upon the banks of which the defendant's yards at Kansas City are situated, there would seem to be no doubt of the negligence of the defendant in not removing the plaintiff's lime to higher ground as a place of safety, or in failing to forward the cars to Omaha, although it became necessary to do so over a different road than the one by which they were billed. It may be said, in view of the repeated warnings of approaching danger, that, if the defendant was unable to immediately forward the lime to its destination, it should have notified the "Frisco" line of that fact, and refused to receive it, which was the course pursued at that time by the other railroads centering in Kansas City, as shown by the testimony of the defendant's witnesses.

It appears that the flood of May, 1903, at Kansas City, Missouri, has resulted in a great many actions against the different railroad companies transacting business in that city; and it appears without exception that the courts

of last resort of the several states where such actions have been brought have held the transportation companies liable for its consequences. In *Pinkerton v. Missouri P. R. Co.*, 93 S. W. 849 (117 Mo. App. 288) the court said: "A carrier is liable for loss of freight from a flood, if it was aware of its approach in time to remove the goods to a place of safety by the exercise of ordinary care and diligence." It was held that the evidence in that case was sufficient to go to the jury on the question of the defendant's negligence in not taking the goods to a place of safety after it knew of the approach of the flood. To the same effect is *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 94 Minn. 269. In that case it was said: "It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at its yards in Kansas City on May 23, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from the defendant's yards on any day after its arrival prior to May 29, and, had this been done, the corn would not have been damaged. If the defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense." See, also, *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.*, 130 Ia. 123, which is another of the flood cases. We are therefore of opinion that the court properly refused to direct a verdict for the defendant.

Complaint is made of the court's fourth instruction, but, in view of the foregoing, this complaint is not well founded. We find no error in the record which affects the

Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.

verdict and judgment in what is called the flood case, and to that extent the judgment of the district court should be affirmed.

It appears that the so-called rate case was brought to recover the sum of \$245.10, an alleged overcharge for the transportation of 13 cars of cement from Hannibal, Missouri, to South Omaha, Nebraska, in June and July, 1906. It was stated in the petition, in substance, that the cement was sold to and used by the Union Stock-Yards Company at South Omaha; that the published tariff of the defendant prescribed a rate of 7½ cents per hundred weight on cement in car-load lots where such cement is used for steam railroads, but that, disregarding this tariff, the defendant required the plaintiff to pay at the rate of 10 cents per hundred pounds for the transportation of this cement, and judgment was prayed for the amount of the alleged overcharge. The answer contains a general denial.

At the trial it was admitted that the published tariff (exhibit 14), as shown by the record, was in force at the time of the transaction complained of, and that the 7½-cent rate was limited to railway material and supplies for steam railroads only for their own use. The tariff sheet is unambiguous in its terms, and provides a rate for west-bound railway material and supplies (except powder and high explosives, rails and fastenings) for steam railroads only C. L. 7½ cents, while the rate to others is fixed therein at 10 cents per hundred pounds. Upon the introduction of the evidence, it appears that the plaintiff was at the times mentioned a corporation existing under the laws of this state, engaged in commerce, and, among other things, in the purchase and sale of lime, cement, coal, and similar commodities, and had its principal place of business in Omaha, Nebraska. Mr. Sunderland testified that his company bought the cement and sold it to the stock-yards company. He further testified that the cement was bought by the company for its own commercial purposes, and that it was bought for resale. No claim is made that the tariff was discriminatory, and plaintiff seems to rely wholly on

the facts which it insists brings the transaction within the 7½-cent rate; while the defendant contends that it clearly falls within the 10-cent rate, and to that end requested the district court to instruct the jury to return a verdict in its favor. This request was denied, and the jury were instructed to return a verdict for the plaintiff. Obeying this instruction, a verdict was returned against the defendant for the sum of \$323.30, which amount was included in the judgment complained of by the defendant.

It is contended that the court erred in refusing to give the instruction requested by the defendant, and to our minds this contention is well founded. It seems clear from even a casual reading of the tariff that the 7½-cent rate was limited exclusively to railway material and supplies for steam railroads only and for their own use; that the plaintiff purchased the cement in question for the purpose of resale, not to steam railways only, but to any one who might have use for that sort of material. By the terms of the tariff the defendant was entitled to charge and receive for transporting it 10 cents per hundred pounds. This rate was fixed and certain, and the company was entitled to know that such would be the compensation for its services. We are therefore of opinion that the plaintiff was not entitled to demand the lesser rate, which applied only to material billed to steam railways for their own exclusive use. It must be observed that this cement was shipped at the 10-cent rate, and the plaintiff does not contend that there was any express contract or arrangement with the defendant that the 7½-cent rate was to apply to this shipment. It simply makes this claim under its construction of the meaning of the tariff.

We think that neither the language of the tariff nor the facts warrant such a construction. It is urged that the Union Stock-Yards Company is a steam railway within the meaning of the tariff, and therefore plaintiff was entitled to the 7½-cent rate; but this contention is beside the mark, for, until the cement was actually received by the stock yards company, plaintiff could have diverted the

Gilliland v. City of Omaha.

shipment and required its delivery to any other customer. On the other hand, it is contended by the defendant that, even if the Union Stock-Yards Company is to be considered a steam railway, still, as a matter of fact, the cement was not used for the purpose of railway construction. As we view the situation, it is unnecessary to consider these questions. We are of opinion that the defendant was entitled to receive and collect from the plaintiff the usual 10-cent rate for this shipment, and that the district court erred in refusing to direct a verdict in its favor upon this cause of action.

It follows that so much of the judgment of the district court as represents the recovery in the rate case should be reversed, and that cause of action should be dismissed; but, as to the so-called flood case, the judgment of the district court should be affirmed. The plaintiff is therefore allowed to file a remittitur with the clerk of this court for the sum of \$323.30 within 40 days, and, upon the filing of such remittitur, the judgment of the district court will stand affirmed; but, upon the failure to do so, the judgment of the district court will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., took no part in the decision.

RHODA GILLILAND, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 26, 1911. No. 16,385.

1. **Municipal Corporations: SIDEWALKS: NEGLIGENCE.** The existence of a step of about eight inches at the intersection of a crosswalk, which was safe and in good repair, with a sidewalk, which was also in good condition, does not of itself constitute actionable negligence.

Gilliland v. City of Omaha.

2. ———: ———: ———. A city is not liable to one who is familiar with the crossing, and who on a rainy evening, on account of the wet and slippery condition of a sound cross-walk, slipped in stepping a distance of about eight inches from the cross-walk to an intersecting sidewalk, which was also in good repair.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Harry E. Burnam, I. J. Dunn and John A. Rine, for appellant.

John T. Cathers, contra.

LETTON, J.

In May, 1908, at the intersection of Pinkney and Twenty-eighth streets, in the city of Omaha, the plaintiff slipped and fell, causing a Colles fracture of her right arm. At the place of the accident there was a wooden cross-walk, extending across Pinkney street, laid upon the natural surface of the ground. Some months previous to this a permanent sidewalk had been laid along the south side of Pinkney street upon the established grade. In order to lay this, it became necessary to excavate to a depth of from 12 to 14 inches at the point where the cross-walk and permanent walk intersected. After the bed for the walk had been prepared and the brick laid, a difference of level existed between the top of the brick walk and the surface of the wooden cross-walk.

The plaintiff testifies that the surface of the cross-walk was about 8 to 10 inches higher than that of the sidewalk, while other witnesses estimate the distance in height at from 6 to 14 inches. In her notice to the city made a few days after the accident the plaintiff states that the difference in height is about 8 inches. A photograph taken a few days after the accident was received in evidence on behalf of the plaintiff, in which the end of the cross-walk is shown, as well as the top of the brick walk. Judging from this photograph, it would seem that the statement of the

Gilliland v. City of Omaha.

plaintiff is correct, and that the height of the step from the brick walk to the cross-walk was about 8 inches at the time of the accident.

The allegations of negligence in the petition are, in substance, that the defendant laid a wooden cross-walk over Pinkney street on the west side of Twenty-eighth street; that this "was carelessly and negligently constructed several inches higher than the established grade of said street at said place, * * * said wooden cross-walk has been carelessly and negligently permitted to remain ever since in said faulty and dangerous condition; * * * that the defendant * * * in building and constructing said wooden cross-walk over and across Pinkney street above the established grade of said street, and leaving and permitting the same to remain (above the brick sidewalk at the south end thereof) in said dangerous and faulty condition, is guilty of gross carelessness and negligence." "It was the duty of the defendant to build and construct said cross-walk in a suitable and safe way, to keep and maintain it in such condition that it be reasonably safe for persons crossing over and along the same in the nighttime, and the defendant by reason of the faulty construction and dangerous condition of said cross-walk, to wit, being higher than the brick walk at their junction and which caused the plaintiff to fall and break her wrist, is liable to the plaintiff in damages," etc. Defendant filed what is substantially a general denial, and further denied that notice of the existence of the claimed defect had been given to the city the statutory length of time before the accident. The plaintiff recovered a judgment, from which the city appeals.

The evidence shows that pursuant to an order of the city council the owner of the abutting property caused the walk to be built at the place staked out by the city engineer. The natural soil in that locality consists of a stiff clay locally known as "gumbo," which, when wet, becomes very adhesive and slippery. The surface of the street being higher than the walk, in rainy weather water flowed

into the slight excavation, and the surface of the brick walk became covered with mud. This, however, is immaterial, since the plaintiff testifies that she did not slip upon the brick sidewalk. Her testimony as to the accident is that between 7 and 8 o'clock on the evening of May 4 she went to visit her son, who lived in the neighborhood; that in doing this she passed over this crossing. The night was cloudy. She stayed at her son's about an hour. When she came back, it was raining, and the walks were wet and slippery. She was well acquainted with the walk in that locality, being in the habit of passing over it several times a day. That the cross-walk was 8 to 10 inches higher than the sidewalk, though she had never measured it; that a street lamp which stood across the street was lighted, but the light was somewhat obstructed by a tree.

On cross-examination she testified: "Q. Now, when you came back that night, you walked in what direction? A. I walked south. Q. South? A. Yes, sir. Q. Looking out for this step-off? A. Yes, sir; I was looking out for the walk. It was slippery—the sidewalk, the crossing. Q. And you stepped from the cross-walk on the permanent brick walk. Is that right? A. As I stepped off of the cross-walk, my feet slipped and I fell over to the right. Q. Well, did your feet slip from the mud on the cross-walk or on the permanent walk? A. No, sir, didn't slip from the permanent walk, I slipped before I struck the permanent walk."

It is apparent that the accident was caused by the fact that the cross-walk was wet and slippery. So far as the evidence shows, both the cross-walk and the sidewalk were in perfect condition. The question presented is whether the city is in any event liable for damages to a foot passenger merely because there is a slight difference in level between a cross-walk and sidewalk, and the surface of the cross-walk is wet and slippery from recent rain. It would be imposing an unwarranted burden upon a city to require that all cross-walks and sidewalks for foot passengers should be constructed either upon a level or upon a uni-

form slope, and without steps, at the points where they intersect each other or reach the level of the drive-way. Moreover, if the court should hold that a difference of 8 to 10 inches in passing from a cross-walk to a sidewalk or from the level of a paved street to the edge of the curb constituted such a negligent manner of construction that the city would be liable for damages every time a person slipped in stepping up or down, this would certainly be laying an extraordinary and unjust tax upon the inhabitants of the city.

In the case at bar the plaintiff was thoroughly familiar with the conditions at this crossing. She knew that at the end of the walk there was a slight step. She says her foot slipped upon the cross-walk, but the cross-walk was not defective. The only negligence charged in the petition which is supported by the evidence is that the walks differed in level, and this we should be reluctant to hold constituted actionable negligence. The evidence shows that the city was engaged in the gradual improvement of this street; that more than a year before there were wooden sidewalks lying upon the natural surface of the ground, and that the city shortly afterwards graded the street. Suppose that in grading the roadway the street was left as far below the level of the sidewalk as the sidewalk at this time was below the cross-walk, could the existence of this step be said to be negligence? We think not.

The city was chargeable with the exercise of reasonable care as to the manner of the construction and connection of the walks, and the existence of the step was not incompatible with the existence of such care. The wet and slippery condition of the walk was not the fault of the city, but a condition which was to be expected under all the circumstances, and greater care on the part of a pedestrian should have been exercised on account of it. Differences of level are to be expected between sidewalks and cross-walks, and care is always necessary at such intersections. This is especially so in wet weather. We think the city is not liable under the proof. This is the view of courts

Maurer v. Reifschneider.

generally. *City of Chicago v. Biaby*, 84 Ill. 82, 25 Am. Rep. 429; *Morgan v. Lewiston*, 91 Me. 566; *Teager v. Flemingsburg*, 109 Ky. 746, 53 L. R. A. 791; *Shippy v. Village of Au Sable*, 65 Mich. 494; *Miller v. City of St. Paul*, 38 Minn. 134; *Robinson v. City of Omaha*, 84 Neb. 642.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

SEDGWICK, J., took no part in the decision.

KATE MAURER, APPELLEE, V. JOHN REIFSCHNEIDER ET AL.,
APPELLANTS.

FILED JUNE 26, 1911. No. 16,414.

1. **Wills: NUNCUPATIVE WILLS: VALIDITY.** A nuncupative will is not effective to pass title to real estate in this state.
2. **Life Estates: LIFE TENANTS: ADVERSE POSSESSION.** The possession of land by a life tenant will not be construed to be hostile and adverse to a remainderman unless the knowledge is clearly brought home to the latter that the life tenant claims the entire estate in his own right, adverse and hostile to any claim or interest in the land by the remainderman or others claiming under him.
3. ———: ———: ———. The recording of a deed conveying the entire estate to a third person by a life tenant who remains in possession of the premises is not alone sufficient to start the running of the statute of limitations against an action to quiet title brought by the remainderman under sections 10868, 10870, Ann. St. 1909.
4. **Limitation of Actions.** Such an action does not accrue until knowledge that the life tenant in possession is claiming to own the entire fee is brought home to the owner of the remainder.
5. **Quieting Title: EQUITY.** In an action to quiet the title of a remainderman as against a life tenant in possession, equity will

Maurer v. Reifschneider.

require as a condition of relief that the plaintiff do equity by paying her proportion of a mortgage lien on the premises which existed at the time of the death of the common ancestor and which was paid by the life tenant.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed in part and remanded.*

A. R. Oleson and Byron G. Burbank, for appellants.

F. W. Button, I. L. Albert and Henry M. Kidder, contra.

LETTON, J.

In 1894 Frederick Stegelmann owned and resided on a farm of 80 acres in Dodge county, Nebraska. He also owned another tract of 80 acres near-by. Shortly before his death, which occurred on July 28, 1894, and while absent from home, he made a nuncupative will in the following form: "If I should die I will all my property over to my wife as she has helped to earn it and worked as hard as I have for it and I wish you to see to it that it should be that way." This declaration was made in the presence of three witnesses, and was afterwards reduced to writing, filed for probate, and allowed by the county court of Dodge county. Afterwards his widow, Emma Stegelmann, married John Reifschneider. Stegelmann left surviving him five brothers and two sisters, one of whom, Kate Maurer, is the plaintiff in this action. In 1897 and 1899 Emma Reifschneider conveyed all the real estate to her husband. The Reifschneiders paid off a mortgage upon the land which was given during the lifetime of Frederick Stegelmann, and afterwards executed another mortgage on the premises. Shortly after the death of Stegelmann and the probate of the nuncupative will, Adolph Stegelmann, Detlof Stegelmann and Christian Stegelmann, brothers of Frederick Stegelmann, deceased, together with their wives, executed and acknowledged certain instruments in writing, each of which recited that they for the consideration of \$1, "and in further

consideration of the expressed wish of our late brother, Frederick Stegelmann, deceased, do hereby surrender, set over and assign unto Emma Stegelmann, his widow, all our rights, interest, and title in and to the estate both real and personal, of our said brother Frederick Stegelmann, deceased." These instruments are dated in August, 1894, and were recorded in April, 1896. The widow and her second husband have been in the possession of the premises either by themselves or by tenants since Stegelmann's death. They have paid the taxes, made some slight improvements, kept up the repairs, and enjoyed the rents and profits of the property. The plaintiff alleges that the widow has a life interest in the tracts; that her possession has not been adverse to that of plaintiff and the other heirs, but by consent, based upon her life interest; that the Reifschneiders now claim to be the owners of all the real estate and are attempting to sell and convey the same to other parties; that the conveyances to the husband were without consideration and constitute a cloud upon her title to the premises. She also alleges she has a quitclaim deed from Ernest and Henry Stegelmann and their wives to the real estate, and is the owner of an undivided three-sevenths interest therein, and prays that her title may be quieted to such interest.

The Reifschneiders answer setting up title by the nuncupative will; also a title by open, notorious, exclusive and adverse possession since June 8, 1895, which has been recognized by the plaintiff and the other heirs. The reply pleads that the nuncupative will could not pass the title to real estate; that defendants have recognized the title of plaintiff and the other heirs within ten years; that the plaintiff by such action has been lulled into the belief that the defendants claim to hold only as life tenants, and that defendants are now estopped to set up another title. Cross-petitions were filed by Christian, Adolph and Detlof Stegelmann, each praying that an undivided one-seventh interest in the real estate be quieted in him. The court found that the plaintiff was the owner of an un-

Maurer v. Reifschneider.

divided three-sevenths interest in the land; that the nuncupative will was ineffective to pass real estate; that Emma Reifschneider is a life tenant of the lands, and that she and her husband are the owners in fee simple of an undivided four-sevenths interest. The title to the three-sevenths interest was quieted in the plaintiff, except as to the life estate of Emma Reifschneider. From this decree the Reifschneiders have appealed to this court.

The appellants contend, first, that the title to the real estate passed to the widow by virtue of the nuncupative will; second, that they have good title to the lands by adverse possession; third, that the finding that the plaintiff is entitled to a three-sevenths interest in the land is not supported by the evidence.

1. The argument upon the first proposition is more ingenious than satisfactory. Section 4993, Ann. St. 1909, provides: "No nuncupative will shall be good, when the estate thereby bequeathed shall exceed the value of \$150 that is not proved," etc. It is argued that the word "bequeathed" in this section is not to be taken according to the technical common law meaning, and that the word "estate" in this section cannot be said to apply to personal estate alone, for the reason that in a number of other sections in the same act the word "estate" is used by the legislature as inclusive of all kinds of property. It may be conceded that the word "estate" has been used to embrace within its terms property of all kinds, and that the word "bequeath" may under some circumstances and used in certain connections be held to be sufficient to pass real estate in a will; but these considerations alone we think are not sufficient to justify the court in holding that it was the intention of the legislature to set aside the statute of frauds as to oral wills (which was based upon actual experience of the dangers to estates arising from frauds, and perjuries incident thereto) in seeking to establish nuncupative wills. By statute this state has adopted "so much of the common law of England as is applicable and not inconsistent with the constitution of the United States.

with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory." Ann. St. 1909, sec. 6955. The temptation to the use of fraud and perjury which led to the enactment of that part of the statute of frauds relating to nuncupative wills (*Cole v. Mordaunt*, in note to *Mathews v. Warner*, 4 Ves. Jr. *196) is just as strong today as centuries ago, and, until the legislature by direct and unequivocal language removes the common law barrier to the transfer of title to real estate by oral wills we must hold that it still exists.

Our attention has not been called to a case from any state, except Ohio, in which it has been held that a nuncupative will is efficacious to pass the title to land. The soundness of that decision is to be doubted, and in that state the statute has since been changed. This court, as well as the courts of this country generally, does not look with favor upon oral testaments. *Godfrey v. Smith*, 73 Neb. 756; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; Gardner, Law of Wills, sec. 15; Schouler, Wills and Administration, secs. 362, 363; *Prince v. Hazleton*, 20 Johns. (N. Y.) *502; 30 Am. & Eng. Ency. Law (2d ed.) 562, and cases cited in note.

2. As to the issue of adverse possession: At the time of Stegelmann's death the statute provided (Comp. St. 1905, ch. 23, sec. 30): "If he (the intestate) shall have no issue, his estate shall descend to his widow during her natural lifetime and, after her decease, to his father." The widow was also entitled to dower and homestead rights; but, since the statute of descent gave her a life estate in all the property, it is unnecessary to consider what other rights she may have had. Where a person is entitled to the possession of land by virtue of having a life estate therein, his possession will not be construed to be hostile and adverse to that of the remaindermen, unless the knowledge is clearly brought home to them that the person in possession claims the entire title in his own right, adverse and hostile to any claims of interest in the land by the remaindermen or others claiming through

them. We have recognized this principle repeatedly. *Larson v. Anderson*, 74 Neb. 361; *McFarland v. Flack*, 87 Neb. 452; *Helming v. Forrester*, 87 Neb. 438; *Palmer v. Mizner*, 2 Neb. (Unof.) 899. See, also, *Gindrat v. Western R. of Ala.*, 96 Ala. 162, 19 L. R. A. 839, and note.

It is insisted that the recorded deed conveying the entire estate from Mrs. Reifschneider to her husband, the mortgage executed by Reifschneider and wife with full covenants of warranty, and the probate of the nuncupative will were constructive notice to the remaindermen of an adverse claim to the land. The general rule is that the recording of an instrument is only constructive notice to those who claim through or under the person executing the same. *Traphagen v. Irwin*, 18 Neb. 195. The supreme court of California say: "The provisions of recording acts are for the protection of subsequent purchasers and incumbrancers from the common grantor, and do not affect the rights of strangers to the claim of title. *City of Chicago v. Witt*, 75 Ill. 211; *Losey v. Simpson*, 11 N. J. Eq. 246; *Traphagen v. Irwin*, 18 Neb. 195; *Ely v. Wilcox*, 20 Wis. *523; *Long v. Dollarhide*, 24 Cal. 218; 2 Pomeroy, *Equity Jurisprudence* (3d ed.) secs. 658, 701. Records are only constructive notice of a title of which they enable a party to obtain actual notice or knowledge by means of a search." *Garber v. Gianella*, 98 Cal. 527. See also, *Prest v. Black*, 63 Kan. 682; *Sensenderfer v. Kemp*, 83 Mo. 581; *De Yampert v. Brown & Johnson*, 28 Ark. 166. There was no obligation on the part of the remaindermen to stand guard over the records in order to protect their title. They were entitled to rest secure, so far as acts of the life tenant in possession were concerned, until the fact that she was claiming an adverse and hostile right was effectually brought home to them. It is true that in *First Nat. Bank v. Pilger*, 78 Neb. 169, it is said that the recording of a warranty deed from the widow to one Green was notice to the world "that the grantee claimed an interest in the land such as the deed purported to convey." The facts, however, in that case were that a grantee of the life

tenant went into possession and held possession hostile to the heirs, asserting he owned the entire estate under the deed executed by the life tenant. The case was properly decided, although some of the expressions used in the opinion are not as carefully made as might have been. In the case at bar the evidence is that the plaintiff was under the impression that Mrs. Reifschneider was occupying the premises as a life tenant, and had no knowledge of her claim to be the absolute owner in her own right until shortly before the action was brought. This being the case, we think the statute of limitations had not run at the time the action was begun.

3. It is further insisted that there is not sufficient proof that the plaintiff is the owner of a three-sevenths interest in the premises. It is admitted by the pleadings that she is one of the sisters of Frederick Stegelmann, and that Ernest and Henry Stegelmann, from whom she obtained title by a quitclaim deed, were brothers of Frederick Stegelmann. The quitclaim deed from the brothers to Kate Maurer is also in evidence. Each brother succeeded to a one-seventh interest in the lands of Frederick Stegelmann, subject to the rights of the widow.

So far we have considered only the issues between the plaintiff Kate Maurer and the defendants Reifschneider. Three of the other heirs who were made defendants in the case filed cross-petitions asserting title in themselves against the Reifschneiders, claiming that the instruments by which they released to Mrs. Reifschneider their interest in the estate had been fraudulently procured. The court found upon this issue for the defendants Reifschneider. Some question was made as to the right of these cross-petitioners to have this issue reviewed, since they did not file notice of appeal under the rules of this court. Strictly speaking, they probably have no standing in this court; but, nevertheless, in the course of the examination of the record, we have become convinced that the finding in the district court on this branch of the case was correct.

It is next contended that the plaintiff should be required

Harse v. Ramer.

to do equity as a condition of the quieting of her title by requiring her to pay into court for the benefit of the life tenant her proportion of the mortgage debt which existed on the premises at the time of the death of the ancestor. We are inclined to think this is just. She should do equity if she receives it. The judgment will be modified so as to require plaintiff as a condition of relief to pay into court for the benefit of the defendants the sum equitably due as her share of the mortgage debt. This may be ascertained by the rule in *Draper v. Clayton*, 87 Neb. 443.

The judgment of the district court is modified and affirmed, and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., took no part in the decision.

JOHN HARSE, APPELLEE, V. OLIVER RAMER ET AL., APPELLANTS.

FILED JUNE 26, 1911. No. 16,455.

Ejectment: APPEAL: CONFLICTING EVIDENCE. Where in an ejectment case the evidence is sharply conflicting as to the true location of an original government corner and as to the question of adverse possession, and there is sufficient evidence on each point to sustain the verdict, this court will not interfere with the findings of the jury.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. L. Hand and Fred A. Nye, for appellants.

N. P. McDonald and John N. Dryden, contra.

LETTON, J.

This is an action of ejectment to recover a strip of land about 10 rods wide at the east end and 12 rods wide at the west end, extending across section 8, township 12, range 18, in Buffalo county. Plaintiff claims that the strip is part of the north half of the section, which is his property, while defendants insist that it is part of the south half of the section, the title to which is in them. Defendants also assert title by adverse possession for more than 10 years. The reply was a general denial. The jury found for the defendants as to all the strip except that lying north of the east one-half of the southeast quarter of the section. As to this portion it found for the plaintiff. Since the true boundary line of the entire strip, according to government survey, was the same, the west three-fourths of the strip must have been awarded to the defendants on account of adverse possession for the statutory period, while the title to the east one-fourth of the strip must have been awarded to the plaintiff on account of the true line being as he contends. The dispute is as to the true location of the quarter corner between the northeast and the southeast corners of section 8. The government corner being missing, the lost corner was established at different points by different surveyors. The location of the northeast corner of the section is also in dispute, and, since the true location of the quarter corner depends upon the location of this corner, much testimony was taken as to this. The testimony with respect to the location of this corner at the intersection of sections 4, 5, 8 and 9 is conflicting. The plaintiff's case virtually rests upon the proposition that a corner stone at this point, which is denominated by him the "lagoon" corner, is the true government corner. The evidence on his behalf is that the quarter corner south of this was lost, and that it was afterwards established by dividing equally the distance between the northeast and southeast corners of section 8.

A great deal of testimony is in the record both by sur-

Harse v. Ramer.

veyors and private individuals with respect to the true location of both of these corners. Some individuals testify that at the time of the early settlement of the county they actually saw the government monuments in place. Others testify that no monument ever existed between the northeast and southeast corners of section 8. Several surveyors agree with the plaintiff's contention as to the "lagoon" corner being the correct one. Others take a different view. One point of the testimony seems beyond dispute, and that is that Surveyor Webster made two surveys. Harse testifies that Webster established the quarter corner and placed a sandstone in an old road, and that on another survey he moved this stone $8\frac{1}{2}$ rods north and $4\frac{1}{2}$ rods east of where it was originally placed. He claims that the first location was correct, while Ramer asserts that the second is the true one. We think it unnecessary to attempt a detailed statement of the evidence. In fact, it would be impossible to do so without extending this opinion to an unwarranted length. The evidence is in such sharp conflict on material points that we must be satisfied with the verdict of the jury as to which of the lines is the correct one according to the original survey. Considering all the evidence in connection with the verdict, it seems clear that the jury found the true line to be where the plaintiff claims it is. It is evident that the Ramers and their father before them had actual possession claiming title to that portion of the strip awarded to them by the jury; part of it since 1885, and part of it since 1894, at which times, respectively, the father became the owner of the adjoining tracts. This possession they maintained up to the time of the trial.

The east quarter mile of the disputed strip, which was found to belong to the plaintiff, is in a different situation with respect to possession. On a portion of this strip Harse in 1883 planted 10 acres of trees. He could not find the quarter corner and was not able to determine just where his line was, but by standing upon a hill and looking eastward he observed trees set out and improve-

Harse v. Ramer.

ments made by other settlers north and south of the line of a road which had previously been laid out in the center of the sections east, and he set out his trees by estimating as nearly as he could where his line would be with reference to the road. He had assisted in running this line, and testifies the surveyor had found original government corners in a straight line running west through several sections to a point a mile east of his land. He cultivated the trees as long as he was able to do so, and built a fence to the north of them, to protect them from his cattle, as he says. In 1892 one Keens was the owner of the east $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 8, which adjoins this on the south. Keens did not live upon the land. In October, 1903, Ramer purchased this 80 acres from Keens, and shortly afterward ran a fence with one wire through the trees which Harse planted, at the place Ramer claimed the true line should be. Some time afterward Harse put a fence on the south side of the trees and south of the wire put up by Ramer. This fence was in turn torn down by the Ramers, but a temporary fence was again put up by Harse's son in an irregular manner along the trees. If the jury were satisfied that plaintiff's contention as to the true line was correct, then the defendants could only be entitled to this, as well as to other portions of the disputed strip, by virtue of adverse possession. We are satisfied that the evidence as to the possession of Keens was not of such a character as to warrant the jury in finding that the defense of adverse possession for 10 years before the action was begun had been established. Ramer leased the 80 acres from Keens, but it is not shown that Keens ever made any attempt to occupy this strip adversely to Harse, or that he pretended to claim adverse possession of the trees or the land on which they stood. The fact that during a part of the time that Keens owned this 80-acre tract the Ramers, while tenants of his, cultivated part of the disputed strip is not sufficient to show that Keens' possession was hostile and adverse. It may have been permissive for all that the

evidence shows, and indeed the plaintiff's evidence would so indicate.

The defendants argue that the court should "consider the great public wrong that will flow from the location of the east and west section lines north of sections 8, 9, 10 and 11 to conform to the *lagoon* corner," and insist that it will affect all owners of property along this line. The manner in which the verdict of the jury may indirectly affect others not before this court cannot be considered. It is possible that, if controversies arise as to the true location of other monuments along the section lines, the evidence may be different. Each case must rest upon the facts which are before the jury in that particular case. This court has no power to determine, as the defendants' counsel requests, "that the *lagoon* corner is not the true corner, but that the true corner is 16 to 18 rods north" of the same.

The defendants complain that the tract awarded to the plaintiff by the jury is larger than that described in the petition. The petition claimed a strip about 10 rods and 8 feet wide at the east end, the north line being marked by a fence, and about 12 rods wide at the west end, though he claimed a smaller tract by adverse possession. The jury awarded a strip 179 feet wide between the true half-section line and the Ramer fence, and this is within the claim made in the petition. The fact that the plaintiff only recovered a part of the tract described in the petition is not material, and does not prejudice the defendants in any way.

Defendants complain that the costs were taxed against them by the district court. The plaintiff claimed about 24 acres of land. He recovered a judgment for about 5½ acres, and the defendants succeeded as to the remainder. Practically both parties succeeded in the action. In such a case it is proper for the district court to divide the costs. *Hale v. Young*, 24 Neb. 464; *McGillin v. Gleason*, 34 Neb. 694; 34 Cyc. 1557.

The judgment of the district court should be affirmed

Storz Brewing Co. v. Hansen.

in all respects, save with respect to the taxation of costs. These should be divided, each party paying his own costs in both courts.*

AFFIRMED.

**STORZ BREWING COMPANY AND ANTON J. KASPAR, SHERIFF,
INTERVENER, APPELLANTS, V. CARL F. HANSEN, APPEL-
LEE.**

FILED JUNE 26, 1911. No. 16,520.

- 1. Execution: SALE: WAIVER OF IRREGULARITIES.** A purchaser of real estate at an execution sale, who after confirmation accepts the sheriff's deed, takes possession and afterwards conveys the same by warranty deed to a third person, thereby waives all errors and irregularities in the making of the sale and in the order of confirmation.
- 2. ———: ———: DISTRIBUTION OF SURPLUS.** Where after confirmation of an execution sale of real estate it appeared that the bid which was accepted was made by the execution creditor, who also held a decree of foreclosure of mortgage against the property; that the execution debtor was insolvent; that the appraisement was of the gross value of the property without deducting liens; that the bid was made with the understanding of both sheriff and purchaser that the excess of the bid should be applied on the foreclosure decree, and no money was paid to the sheriff; a motion to require the officer to pay the amount of the bid over the execution debt into court for the benefit of the debtor should not be sustained, or, if sustained, the order not enforced until a reasonable opportunity is afforded the plaintiff by proper pleadings to set out the facts and apply for equitable relief.

APPEAL from the district court for Colfax county:
CONRAD HOLLENBECK, JUDGE. *Affirmed in part and re-
manded.*

*James W. Hamilton and George W. Wertz, for appel-
lants.*

Frank Dolezal, contra.

* September 25, 1911, order entered taxing costs to appellants.

LETTON, J.

The Storz Brewing Company held two mortgages upon certain real estate, the property of the defendant Hansen, one for \$500 and the other for \$1,800. It began foreclosure proceedings upon both mortgages, but afterwards dismissed the action as to the \$500 mortgage. The action proceeded to decree upon the remaining mortgage, and the execution of the order of sale was stayed for the statutory period. Pending the expiration of the stay, judgment was obtained in an action at law upon the note for \$500. Execution was issued upon this judgment and levied upon the mortgaged property. Appraisers were appointed, who appraised the property at the sum of \$1,500 as the gross valuation; no certificates of liens being procured and no deduction being made. The property was sold by the sheriff to the plaintiff, Storz Brewing Company, upon a bid of \$1,300. The sheriff made return of the sale, which was confirmed on March 2, 1909, and a deed made by the officer to the purchaser. Thereafter the brewing company sold the premises to John Metzger. On the 3d day of May a motion was filed by defendant Hansen to require the sheriff to pay into court for his benefit \$745.75, being the proceeds of the sale after satisfying the execution. On June 14 the plaintiffs moved the court to grant leave to the sheriff to amend his return, so as to show that the property was appraised at the gross valuation of \$1,500, that the bid was on the gross valuation, and that no cash was received by the sheriff. Affidavits were filed in support of this motion. On July 2 the motion to require the sheriff to pay to defendant the remainder of the proceeds was sustained, and the motion of plaintiff to grant leave to the sheriff to amend his return of the execution was overruled, to which rulings exceptions were taken. On September 16 the sheriff filed a motion to set aside the sale and order of confirmation, supported by affidavit setting forth in detail all the facts with reference to the foreclosure of the mortgage, the

Storz Brewing Co. v. Hansen.

existence of the mortgage decree against the premises, that by mistake he understood that the mortgage lien was subject to the judgment, and that the surplus of the bid over the amount called for by the execution might rightfully be applied on the decree of foreclosure, that the bid of \$1,300 was on the gross value of the premises, and that it was understood that plaintiff might pay the remainder of the bid over the judgment debt by crediting the same on the decree. The motion also set forth that Metzger consented to the setting aside of the sale. Objections and affidavits in resistance to this motion were filed by Hansen, and also by Metzger, who denied that he consented that the sale should be set aside, and alleged his title by warranty deed from the Storz Brewing Company. The motion of the sheriff to set aside the sale and confirmation and for leave to amend his return was overruled. From these rulings, the Storz Brewing Company and the sheriff have appealed.

It is apparent from the affidavits that careless and slipshod methods of practice were indulged in with respect to the sale. It is equally apparent that neither the Storz Brewing Company nor the sheriff are entitled to have the sale set aside. Metzger has the legal title to the property, is not a party to this suit, and has not consented to the proposed action. Moreover, by the acceptance of the sheriff's deed and subsequent acts of control over the property, all irregularities were waived. *Hooper v. Castetter*, 45 Neb. 67.

While the district court was justified in refusing to set aside the sale and confirmation, we are convinced that the motion directing the sheriff to pay the money to Hansen should not have been sustained without at least reserving to the plaintiff the right to apply in equity to set off against this sum an equal portion of the mortgage debt. Hansen is insolvent; he owes the plaintiff over \$1,800; still, by order of the court, plaintiff is compelled to pay to the sheriff for his benefit the sum of \$745.75, as it alleges, by reason of a mistake made at the time of the sale.

Stora Brewing Co. v. Hansen.

We think that the motion of plaintiff, together with the affidavit of the sheriff and attorney showing the facts, would have justified the court in treating the same as being of the nature of an application to be allowed to credit the excess of the bid upon the foreclosure decree, and in directing proper issues to be made up and evidence taken in order to determine the rights of the parties in this regard. The court made no error, strictly speaking, in overruling the motion, but evidently there were rights claimed that it would have been better to settle at that time. It is even now not too late to allow this to be done. A reasonable opportunity should be afforded the plaintiff to make this proof. A case applying the principle is *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531. In that case we said: "It is not in every case that a court of equity will set off mutual demands which are distinct and independent of each other, but the insolvency of one party is a circumstance which strongly appeals to a court of conscience to apply the rule. If the result of the refusal would deprive one party of his property for the benefit of others to whom he is under no obligation, this will justify the granting of the relief prayed."

The order of the district court refusing to allow the sale to be set aside is right, and must be affirmed; but the judgment otherwise is modified so as to allow the plaintiff to make proper application herein to apply the proceeds of sale upon the foreclosure decree, for the court to try any issues raised upon such application, and to make such further orders in the matter as may be just. The cause is remanded to the district court to permit such application to be made, and for further proceedings, if necessary.

JUDGMENT ACCORDINGLY.

ROOT, J.

I concur in the conclusion of the majority opinion that the district court did not err in refusing to permit the sheriff to amend his return, but I dissent from that part of the opinion and the conclusion which modifies the

Blid v. Chicago & N. W. R. Co.

judgment of the district court and directs further proceedings to be had to permit a set-off of the debt represented by the decree against the money in the sheriff's hands.

The sheriff sold under execution whatever right Hansen had in the mortgaged premises, subject, of course, to the mortgage foreclosure, and the execution creditor paid \$1,300 therefor. Now, if the \$745.75 surplus be seized to satisfy a part of that decree in foreclosure, Hansen should to that extent be subrogated to the lien of the decree, and in the end the same result would obtain as will happen if the judgment of the district court be affirmed and Hansen be permitted to collect his money.

There is absolutely no justification in law for that part of the majority opinion to which I dissent.

FAWCETT, J., concurs in this dissent.

GUSTAF A. BLID, APPELLEE, v. CHICAGO & NORTHWESTERN
RAILWAY COMPANY, APPELLANT.

FILED JUNE 26, 1911. No. 16,505.

1. **Evidence:** DIRECT AND CIRCUMSTANTIAL. The competent relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless those circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true.
2. ———. The evidence in this case is commented upon in the opinion, and *held* insufficient to sustain the verdict of the jury.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Reversed.*

*B. T. White, C. C. Wright and B. H. Dunham for ap-
pellant.*

J. E. Porter, contra.

Root, J.

This is an action to recover damages for the death of live stock caused, as alleged, by the defendant's failure to maintain lawful cattle-guards at a highway crossing. The plaintiff prevailed, and the defendant appeals.

The sole question for our determination is whether the evidence sustains the verdict.

At the point where the cattle were killed, the course of the highway is north and south and that of the railway is approximately east and west. The cattle were killed by an east-bound stock train about 11 o'clock A. M., November 15, 1907. The evidence adduced by the plaintiff to sustain his allegation that his cattle went upon the defendant's right of way because of insufficient cattle-guards may fairly be summarized as follows:

Early in the forenoon the cattle were confined in a pasture from whence they subsequently escaped into the highway. The defendant's fences were in good repair, but the cattle-guards were insufficient to turn live stock. In the afternoon the plaintiff, in company with a Mr. Canfield, went to the scene of the accident, found the carcass of the bull about 60 feet east of the crossing at the bottom of the six-foot fill upon which the railway is laid, and found the carcass of the cow several feet further eastward at the bottom of and on the other side of the grade; 150 feet further eastward a crippled calf was found. For six to ten feet westward from the points where the carcasses lay, the witness found evidence that the bodies of the animals had been pushed or had slipped over the rails and the ties.

The defendant produced the fireman and the engineer in charge of the train, and they testify positively that, as the locomotive emerged from a cut at the end of a curve, the cow, the bull and the calf were standing in the highway on the planks between the rails; that the stock alarm was sounded, and, so soon as it was evident that the cattle did not intend to move, the air brakes were applied, so

that the speed of the train was decreased to 15 or 18 miles an hour as it passed over the crossing, but that it was impossible to stop the train and avoid a collision with the cattle, which occurred either right at the traveled way or between it and the cattle-guards; that the bodies of the cattle were carried on the pilot over the cattle-guard and beyond for a space until they rolled or fell off of the engine. The engineer testified that in his experience bodies of cattle have been thus carried for 100 yards before they would become disentangled and fall from the pilot. Two other witnesses testified that there were no cattle tracks on the railway grade east, but that there were such tracks on the highway between the rails west, of the cattle-guards; that hair was found upon the cattle-guards and occasionally from thence eastward to the point where the carcasses were found, but no blood stains were observed along the route.

The plaintiff in rebuttal produced a witness who testified, in substance, that he was familiar with the operation of railway trains, and on three different occasions witnessed collisions between locomotive engines and live stock, and that from his experience he did not believe that the cow, the calf and the bull could have been carried upon the defendant's locomotive engine as testified to by the fireman and the engineer.

The plaintiff contends that, although the sole eye-witnesses to the transaction testify that the cattle were in the highway at the time of the collision, the inferences that may logically be drawn from the facts and circumstances testified to by the other witnesses are sufficient to overcome the direct testimony, which, it is argued, is so inherently improbable that the jury were justified in rejecting it, and that the verdict should not be disturbed.

Circumstantial evidence may be received to establish a fact in contradiction to the positive testimony of alleged eye-witnesses to the transaction; but circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circum-

stances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Asbach v. Chicago, B. & Q. R. Co.*, 74 Ia. 248; *Lopez v. Campbell*, 163 N. Y. 340; *American Freehold Land Mortgage Co. v. Whaley*, 63 Fed. 743.

The defendant's witnesses admit that one of its engines collided with the plaintiff's live stock. Does it reasonably appear by inference or otherwise that the collision occurred within the defendant's right of way and without the highway? The fact that no cattle tracks were found upon the railway grade between the points where the carcasses were found and the cattle-guards, and that such tracks were found upon the grade within the highway, tends strongly to discredit the inference that the cattle voluntarily crossed the guards. The fact that the tracks were noticed on the grade and within the highway refutes the argument that the ground was so hard and dry that cattle would make no impression by walking thereon. The suggestion that the cattle may have entered the right of way at another crossing some distance eastward seems improbable in the light of all of the evidence. There is no proof that the cattle-guards at that crossing were out of repair or insufficient; there is no evidence that cattle tracks were found upon the grade east of the point where the carcasses were found, nor is there any evidence that the cattle ascended the grade within the defendant's right of way, but outside of the highway. The fireman and the engineer are the only persons having absolute knowledge of the facts, and we detect nothing improbable in their statements. The momentum of the train moving at the rate of 15 or 18 miles an hour was such that the plaintiff's cattle were as mere straws in the path of the train, and the locomotive in three seconds of time moved the 50 or 70 feet intervening between the point of collision and the points where the cattle rolled down the grade. It seems to us that every fact testified to by the plaintiff's witnesses is consistent with the testimony of the fireman

Fitzgerald v. Young.

and the engineer, so that upon a consideration of all of the evidence there is no substantial conflict therein. Unless the established facts from which the plaintiff deduces the fact that his cattle had crossed the guards before the collision cannot in reason be reconciled with the testimony of the engineer and that of the fireman, they do not contradict that testimony and will not sustain a verdict in the plaintiff's favor. As we have said, not only do those facts not contradict the direct testimony, but they are consistent therewith.

The defendant's motion at the close of the evidence for a directed verdict should have been sustained.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JENNIE FITZGERALD, APPELLEE, v. EDWARD E. YOUNG, APPELLANT.

FILED JUNE 26, 1911. No. 16,465.

1. **Appeal: REVIEW.** Affidavits in support of a motion for a new trial cannot be considered on appeal, unless made a part of the bill of exceptions.
2. **Libel and Slander: EVIDENCE.** Where plaintiff in a suit for slander pleads that words actionable *per se* were spoken of plaintiff by defendant in presence of a third person named and others, proof that the words were spoken to such person alone will sustain a recovery.
3. **Appeal: VARIANCE.** On appeal a judgment will not be reversed for an immaterial variance between an allegation in the petition and plaintiff's proofs.
4. **Libel and Slander: EVIDENCE.** To say of a woman in her profession of school teacher that she "is crazy and not fit to teach school," or that she "is crazy and is an unmerciful liar and is unfit to teach school," is actionable *per se*, if the words are spoken to and heard by a third person.
5. ———: **SPECIAL DAMAGES: PLEADING.** In a suit for slander, pleading

Fitzgerald v. Young.

and proof of special damages are unnecessary, where the imputation is actionable *per se*.

6. ———: INSTRUCTIONS. Where words actionable *per se* are proved as pleaded in an action for slander, the trial court should not sever the words or phrases composing the defamatory matter and instruct the jury that the dismembered parts are not defamatory.
7. ———: EVIDENCE. In proving a slander composed of several phrases, a witness is not required to state in an answer to a single question all of the defamatory matter pleaded, but it is sufficient for him to testify in several answers to all of the phrases composing the whole and state facts showing that they were published in one conversation in the sense alleged in the petition.
8. Appeal: BRIEFS: REFERENCE TO BILL OF EXCEPTIONS. If criticism of an instruction is based on particular testimony, such testimony should be specifically pointed out in the brief by a correct reference to the page or pages in the bill of exceptions where it may be found.
9. Libel and Slander: PUBLICATION: LIABILITY. A defamer who publishes a slander may be held liable for the consequences of later publications naturally resulting from his act.
10. Appeal: REVIEW. On appeal appellant cannot predicate error on a ruling in his own favor.
11. Libel and Slander: MALICE: EVIDENCE. Where malice is an issue in an action for slander, the plaintiff may show that defendant repeated the slanderous words both before and after the commencement of the suit. *Bloomfield v. Pinn*, 84 Neb. 472.
12. ———: PRIVILEGE: PLEADING AND PROOF. In an action for slander, the defense of privilege, to be available, must be proved.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed*.

Tibbets & Anderson and J. B. Strode, for appellant.

George W. Berge, contra.

ROSE, J.

This is an action for slander resulting in injury to plaintiff in her profession of teacher. She had been regularly employed at a salary of \$45 a month to teach in a

public school near the village of Panama for nine months, beginning September 10, 1906. The defamatory expressions attributed to defendant are: (1) "Miss Fitzgerald is crazy and is an unmerciful liar and is unfit to teach school." (2) "Miss Fitzgerald is crazy and not fit to teach school." According to the petition, both statements were made "in the presence and hearing of Frank A. Phillips and divers other citizens," the first having been published at Panama, on or about December 1, 1906, and the second on a public highway near plaintiff's school, on or about December 15, 1906. The answer was a general denial. The jury rendered a verdict in favor of plaintiff for \$3,500, but to prevent the granting of a new trial she filed a remittitur for half of that sum, and from a judgment against defendant for \$1,750 he has appealed to this court.

Failure to grant a new trial on account of newly-discovered evidence is urged as a ground of reversal, but the ruling assailed cannot be reviewed because the affidavits relating to the evidence discovered after the trial are not in the bill of exceptions. They appear in the transcript, but that is insufficient to show they were presented to and considered by the trial court. *Rosecrans v. Asay*, 49 Neb. 512.

Complaint is made of an instruction reading thus: "This is an action for slander. Words spoken falsely of a woman school teacher, that she is crazy and an unmerciful liar and unfit to teach school, when coupled together, are actionable in themselves, or *per se*, and in an action of slander against the person who made such a charge it is not necessary to either allege or prove special damages in order to maintain the action. The law implies that such words were maliciously spoken. If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, on or about the 1st and on or about the 15th of December, 1906, or either of said dates, the slanderous words as alleged in the petition, in the presence and hearing of one Frank A. Phillips, or other per-

Fitzgerald v. Young.

sons, then the plaintiff would be entitled to a recovery in this action."

One criticism is that the instruction is inapplicable to the issues and proofs, since the petition charges that the defamatory statements were made "in the presence and hearing of Frank A. Phillips and divers other citizens," while the evidence shows that Phillips alone heard them. Phillips was a witness on behalf of plaintiff, and testified that the slanderous words pleaded were uttered by defendant in his presence in a store in Panama. He states also that others were present, and that some of them might have been within a few feet of defendant; that afterward the story was common report in the neighborhood; that there were groups of people in the village discussing it; that it was discussed by patrons of the school and others; that only half the pupils attended school; and that plaintiff had difficulty in finding a boarding place. On cross-examination defendant admitted that he had a conversation with Phillips about December 1, 1906, in the store in Panama; that he had talked about plaintiff in her professional capacity, and that he had said she was "queer." He denied that others heard his statements, but qualified his denial by saying that he did not remember of others having heard what he said. It thus appears that there is direct proof that the defamatory matter was published in the presence of Phillips, and there is at least a strong inference that others heard it. In any event, the evidence indicates that by some means it spread over the neighborhood. The instruction did not relate to the measure of damages, but it directed the jury that plaintiff would be entitled to recover, if they believed from the evidence that defendant, at the time alleged in the petition, spoke of and concerning her in the presence of Phillips, *or other persons*, the defamatory words pleaded. In proving a publication, plaintiff was not required to show that the slander was made known to the public generally. For that purpose it was enough to show that it was orally communicated to a single person other than

Fitzgerald v. Young.

plaintiff. *Adams v. Lawson*, 17 Grat. (Va.) 250; *McLaughlin v. Schnellbacher*, 65 Ill. App. 50; *Luick v. Driscoll*, 13 Ind. App. 279. Actionable words spoken may be proved by any one who heard them, though it is alleged they were uttered in the hearing of a person named and others. *Bradshaw v. Perdue*, 12 Ga. 510; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; 2 Greenleaf, Evidence (16th ed.) sec. 414. The injury for which plaintiff demands redress resulted from the publication of the actionable words. If the patrons of her school or others afterward collected in groups and discussed the story that she was crazy and a liar, the fact of the publication became more important than the names of the persons to whom it was told. The code recognizes this principle, and provides that in an action for slander it is sufficient to state generally in the petition that the defamatory matter was spoken of the plaintiff. Code, sec. 131. Under the statutory rule it is not necessary to allege the name of the person to whom the words were spoken. *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489. To establish her right to recover, plaintiff was only required to prove that the slanderous statements were spoken to a person other than herself. This proof was adduced. If there was a variance between an unnecessary allegation of the petition and the testimony, it was immaterial, within the meaning of section 138 of the code, which declares that "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice." It follows that a reversal cannot be based on that part of the instruction permitting a recovery, if the defamatory words were spoken to Phillips or others.

The instruction is also criticised because it contains a ruling that the charges pleaded are actionable *per se*. The petition and evidence show that defendant spoke of plaintiff in her profession of teacher. If his statements were true, she should not be engaged in teaching, and school officers should not employ her. The circulation of

such reports would injure, if not ruin, her professionally. That they are actionable *per se* is not open to controversy. *Lindley v. Horton*, 27 Conn. *58; *Price v. Conway*, 134 Pa. St. 340, 19 Am. St. Rep. 704; *Williams v. Davenport*, 42 Minn. 393, 18 Am. St. Rep. 519; *Danville Democrat Publishing Co. v. McClure*, 86 Ill. App. 432; *Totten v. Sun Printing & Publishing Ass'n*, 109 Fed. 289. The words being actionable on their face, pleading and proof of special damages were unnecessary. *Boldt v. Budwig*, 19 Neb. 739. It follows there is no prejudicial error in the instruction quoted..

Other assignments of error are based on the failure of the trial court to instruct separately upon request of defendant that "calling one 'an unmerciful liar' was not defamatory"; that "to speak of a person as 'crazy' is not defamatory"; that "to speak of a person as 'unfit to teach school' was not defamatory." These requested instructions did not state the law applicable to the issues and the proofs, and were properly refused. The expressions pleaded were actionable *per se*, and plaintiff's evidence tended to show that they were published as alleged. The petition stated, and the testimony on behalf of plaintiff tended to show, that she had been slandered in her profession of teacher, and the rejected instructions disregarded this feature of the case. The trial court properly declined to sever the different phrases or words for the purpose of eliminating from the dismembered parts the sting of slander. There was nothing in the testimony to justify the course suggested by defendant in the requested instructions. While Phillips did not in a single answer to a question repeat on the witness-stand all the words of an entire slander as pleaded, he repeated in several answers all the words constituting both slanders, and testified to facts showing that they were spoken of and concerning plaintiff in a single conversation, as alleged in the petition. This was sufficient proof of the publication of the defamatory expressions attributed to defendant. 2 Greenleaf, Evidence (16th ed.) sec. 414; *Iseley v. Love-*

joy, 8 Blackf. (Ind.) *462. It follows that the trial court did not err in refusing to charge the jury as requested.

A direction to the jury to consider in a limited sense evidence relating to plaintiff's troubles with the school board and the county superintendent is the subject of another assignment. Defendant in discussing the instruction has not specifically pointed out the particular testimony which, from his standpoint, makes the charge erroneous. In the bill of exceptions there are 759 pages of type-written matter, and they will not be searched on this point, since defendant has disregarded the rule that "each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief." 80 Neb. xi, rule 9, par. *h*. The discussion of some of the other instructions relating to evidence is subject to the same infirmity.

It is further argued that the trial court erred in refusing to instruct, in substance, at the request of defendant, that plaintiff's right of recovery, if any exists, is limited to the words spoken to Phillips. The argument seems to be that plaintiff was permitted to recover for mental suffering and for other elements of damage not traceable to the original publication. Testimony requiring such an instruction is not pointed out in the manner required by the rules of this court, but the instruction requested did not state the law of slander applicable to the present controversy. A defamer is not permitted to speak actionable words to a single person, when others are near, and call upon the court in an action for slander to protect him from the consequences of later publications which naturally result from his act. The rule is that "one who puts a libel in circulation is liable for any subsequent publications which are the natural consequence of his act." *Schmuck v. Hill*, 2 Neb. (Unof.) 79. Whether subsequent publications were the natural consequences of the original slander was a question for the jury. The original publication was fairly proved. That the slander was common report afterward was shown without objection. Plaintiff

was permitted to testify that the publications caused her mental suffering. This was not prejudicial error. *Laing v. Nelson*, 40 Neb. 252. Viewed in any proper light, the instruction should not have been given.

A number of affidavits copied from the record of another suit appear in the bill of exceptions, and defendant insists they were erroneously admitted in evidence. The record, however, shows the objection to their admission was sustained. Of course, he cannot predicate error upon a ruling in his favor.

Defendant also complains because the trial court allowed a witness to testify that defendant, when at the Burlington station in Lincoln, February 9, 1907, published to persons then present statements similar to those alleged in the petition. The defendant was permitted to defend as though the alleged slanderous words were uttered under such circumstances as to make them qualifiedly privileged, and the evidence challenged was responsive to this feature of the case. By an instruction the jury were only allowed to consider this testimony for the purpose of showing malice. The law applicable was recently stated as follows: In an action for slander, the plaintiff may show a repetition by the defendant of the slanderous words both before and after the commencement of the suit to prove the existence of malice. *Bloomfield v. Pinn*, 84 Neb. 472.

Defendant seeks protection from the judgment on the ground that the communications were privileged. This defense is based on the fact that he was a member of the school board which employed plaintiff. The occasion was not a privileged one. Phillips, the person who heard the imputations, lived in another school district and was not a member of any board, court or other tribunal having authority to investigate plaintiff's conduct or qualifications as a teacher, or to remove her from her position or to grant other relief, if the charges made by defendant were true. The store and the public highway, in the absence of school officers, were not privileged places to pre-

Staley v. State.

fer charges under the circumstances disclosed. It does not appear that Phillips was a magistrate or a commissioner of insanity who should be advised of the conduct and condition of plaintiff in her own interests or for the public good. It is not shown that Phillips was a confidential adviser of defendant. The defense of privilege is not shown in any way. Besides evidence indicating malice was submitted to the jury.

No reversible error has been found, and the judgment is

AFFIRMED.

ALFRED T. STALEY V. STATE OF NEBRASKA.

FILED JUNE 26, 1911. No. 17,105.

1. **Bigamy: INTENT.** In a trial for bigamy under a statute which does not make intent an element of the crime, it is no defense for accused to prove he acted in good faith on advice of counsel that a former marriage to his cousin was void, and that a deputy county attorney threatened him with prosecution for living with her, where such former marriage is valid.
2. **Criminal Law: APPEAL: ADMISSION OF EVIDENCE.** The admission of evidence not prejudicial to accused is not a ground of reversal.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. Affirmed.

George A. Adams and W. W. Towle, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

ROSE, J.

In a prosecution by the state, Alfred T. Staley, defendant, was convicted of bigamy, and for that offense was sentenced to serve a term of one year in the penitentiary.

Staley v. State.

As plaintiff in error, he is now seeking a reversal of the judgment against him.

This is defendant's second conviction for the same offense; the first having been reversed as erroneous. *Staley v. State*, 87 Neb. 539. A statute declares that a marriage in this state between first cousins is void. Comp. St. 1909, ch. 52, sec. 3. Though that relationship exists between defendant and Hettie Bixler, they were married in Council Bluffs, Iowa, in 1907, when they were residents of Omaha. Under the laws of Iowa the marriage is valid there, and consequently it is likewise valid here. *State v. Hand*, 87 Neb. 189. They lived together as husband and wife until February, 1908, when he left her in Omaha, where they were at the time residing. Without procuring a divorce, defendant was married to Pearl Stoner, in Lancaster county, August 7, 1909, though his former wife is still living. These facts and conclusions are not in dispute.

Defendant argues that the conviction should not be permitted to stand for the following reasons: In entering into the second marriage, he did not intend to commit a crime. He believed in good faith that his marriage with his cousin was void, and that a divorce or an annulment of the marriage was entirely unnecessary. He was so advised by three lawyers and conscientiously relied upon their advice. A deputy county attorney of Douglas county told defendant the marriage was void, and threatened him with prosecution if he did not abandon his unlawful relations with his cousin. During the trial defendant offered to prove these facts, and the exclusion of proof offered for that purpose is his principal ground of complaint. Can he excuse his bigamy by showing that he was cowed by the threat of the officer and that in good faith he acted on the advice of counsel? The validity of the marriage with his cousin was a question of law, and not of fact. Ignorance of facts, where there is no criminal intent, often excuses offenses, but this rule does not in general extend to ignorance of the law. That one accused of crime had endeavored to ascertain the law and had been misled

by counsel or a magistrate is not generally a defense. 1 Bishop, New Criminal Law, sec. 294; *State v. Goodenow*, 65 Me. 30; *Weston v. Commonwealth*, 111 Pa. St. 251. This principle applies to offenses against the marriage relation. Bishop, Statutory Crimes (3d ed.) sec. 662; *State v. Goodenow*, 65 Me. 30; *State v. Sherwood*, 68 Vt. 414; *People v. Weed*, 29 Hun (N. Y.) 628. Courts and text-writers recognize the fact that hardships sometimes result from the enforcement of the ancient maxim, "Ignorance of the law excuses not"; but it cannot be abandoned without serious consequences to society. The people in adopting the constitution fully appreciated the possibility that injustice in exceptional cases would result from the enforcement of laws enacted to prevent crime and to punish criminals. To afford protection in such instances was one of the purposes in view when the pardoning power was conferred upon the governor.

That defendant was free from the criminal intent essential to a crime is the principal feature of an able argument in his behalf. The statute denouncing bigamy does not make intent an element of the crime. It provides: "That if any married person, having a husband or wife living, shall marry any other person, every person so offending shall be imprisoned in the penitentiary not more than seven years nor less than one year." Criminal Code, sec. 201. Malice may be implied from a wilful violation of the statute and a reckless disregard of existing marital relations. Both defendant and his cousin-wife testified there never had been any domestic trouble to suggest a separation. There is proof that he knew that she was pregnant when he left her. Under such circumstances he had an accusing conscience when he formed the purpose to abandon her, unless he was devoid of all marital sentiment and of every worthy instinct of paternity. These natural impulses of the human heart ought to have given a warning signal, even if the statutes had been silent on the subjects of bigamy and divorce. To the threatened prosecution in a court of justice, his valid

marriage would have been a complete defense. If, however, he was intimidated by threats of prosecution, he could have lived apart from his wife in safety during the time required for the determination of his social status in a court of justice. The state is interested in the consequences of the relation created by marriage. *Willits v. Willits*, 76 Neb. 228. For the good of society and for the protection of the family, marriage is carefully guarded by law. After becoming the husband of his cousin, his obligations to her, to his unborn child, and to society required care and diligence on his part before leaving his wife and marrying again without a divorce. He knew it was at least doubtful whether the marriage was void. Otherwise he would not have asked the advice of counsel. The deputy county attorney was the prosecuting officer of the state, and not the attorney for defendant. Counsel may give advice, but the duty of adjudicating whether a marriage is void is a function of the courts. Lawyers and laymen alike know this. In civil controversies involving property rights only, individuals often refuse to act without an order of court; but, if the evidence on behalf of the state is believed, defendant, on the mere advice of counsel that his marriage was void, was willing to abandon his wife as an adulteress and leave her with the prospect that she would become the mother of a bastard child. The obligations of one who has voluntarily entered into the marriage relation require a greater degree of care than that exercised by defendant. He acted on the advice of counsel at his peril, and under the law it is no defense in this case.

It is further insisted that the state was erroneously permitted to introduce testimony that a child was the issue of defendant's marriage with his cousin. Defendant himself testified to that fact, and it is perfectly plain on the face of the record that he was in nowise prejudiced by such proof in his attempt to establish the defense already outlined.

It is suggested, further, that the court erred in admit-

Heink v. Lewis.

ting in evidence an Iowa statute showing that it is not unlawful for cousins to marry in that state. An examination of the record shows that the ruling assailed is sanctioned by former holdings of this court. No prejudicial error has been found, and the judgment is

AFFIRMED.

SEDGWICK, J., took no part.

OTTO HEINK, APPELLEE, v. THEODORE F. LEWIS, APPELLANT.

FILED JUNE 26, 1911. No. 16,501.

Evidence examined and set out in the opinion held insufficient to sustain the verdict of the jury.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed.*

Martin Langdon and Howard B. Smith, for appellant.

Charles W. Haller, contra.

FAWCETT, J.

Plaintiff alleges that on or about February 17, 1906, he made an oral agreement with defendant that plaintiff should take charge of a certain brewery at Crete, Nebraska, and perform the duties of superintendent, manager, and brewmaster, and receive from defendant \$75 a month therefor, which amount defendant agreed to pay; that he duly performed his part of the agreement and worked steadily from said date until January 1, 1907, when it was orally agreed between plaintiff and defendant that plaintiff should receive from defendant for said services \$125 a month, which defendant agreed to pay, and that plaintiff fulfilled his part of said new agreement

Heink v. Lewis.

until June 17, 1907; that defendant paid to plaintiff on account of the foregoing \$75, \$35 and \$10; that during the year 1906 plaintiff at the oral request of defendant furnished money in the payment of help at said brewery and at a new one then building, and to pay for materials, in the sum of \$750, no part of which has been paid. The answer denies all of the allegations of plaintiff's petition, and alleges "that the Western Brewing Association, the brewery referred to in plaintiff's petition, is a corporation duly organized according to the laws of the state of Nebraska, and located at Crete, Saline county, Nebraska;" that said association leased the old brewery from the estate of one Kobes; that plaintiff was chief promoter of said brewing association and became its president and was a stockholder and director of said brewing association; and that "(9) this defendant further states that he was not the owner of said brewery, and that he had no interest in the same, except as a stockholder; that he was not authorized by said association, nor did he have any authority, directly or indirectly, to hire any party or parties, as superintendent, brewmaster or otherwise, to work for said brewing association." The reply denies paragraph 9 of the answer, and denies that plaintiff was the chief promotor of said association. The jury returned a verdict for plaintiff for \$500, upon which judgment was entered, and defendant appeals.

Some minor questions are discussed in briefs of counsel, but, having reached the conclusion that the judgment must be reversed for the reason that it is not sustained by the evidence, such other questions need not be considered.

The record shows that on June 1, 1905, plaintiff, Otto Heink, together with P. A. Gavin and A. L. Knabe, organized and incorporated the Western Brewing Association of Crete, Nebraska. The articles of incorporation provided that its capital stock should be \$100,000, to be divided into shares of \$10 each; "said capital stock when subscribed for and issued shall be fully paid and non-

Heink v. Lewis.

assessable." Of this capital stock 1,700 shares were issued to Mr. Heink, who was made president of the association, and 1,700 shares to Mr. Gavin, who was made secretary and treasurer. Just how much was issued to Mr. Knabe, who was made vice-president, is not shown. Neither Heink nor Gavin paid anything for their stock. Subsequently Knabe was substituted as treasurer, and Gavin became vice-president, in addition to his secretaryship. All three became directors, and, so far as the record shows, continued as such unless Mr. Lewis, when he later became a member of the association, succeeded Mr. Knabe in that capacity. The evidence upon this point is not very clear. It is clear, however, that Heink and Gavin were directors from start to finish. The original incorporators having paid nothing for their stock, there was no money in the treasury, so that it was a corporation on paper, but without funds. Mr. Knabe was a friend of defendant Lewis, and occupied the same office with him in the New York Life Building in Omaha. At the beginning of their business career Mr. Knabe and Mr. Gavin, who seemed also to have been acquainted with defendant, borrowed money from him from time to time. Among other sums they borrowed \$2,500 with which to furnish a site for a brewery, and gave him therefor the association's note. Instead of building a brewery, they finally decided to lease the Kobes brewery at Crete, after which they entered upon the brewery business and also conducted a saloon in that city. After they had been borrowing for some time, Heink asked Mr. Knabe from whom they were borrowing money, and finally about July 1, 1906, Heink was introduced to Mr. Lewis by Knabe. Mr. Knabe testifies to this positively, and says that Heink had never met Lewis prior to the time of this introduction. Shortly thereafter, the exact date not being shown, defendant was induced to purchase a block of the association's stock, for which he paid into the association \$5,000 in cash. The brewery burned in June, 1907, and the books of the association were burned in that fire. Plaintiff does not testify as to

Heink v. Lewis.

the proceeds of sales of beer. Gavin, who, according to the testimony of plaintiff, was to receive \$100 a month as business manager, was unable to state the amount of such sales. Knabe testified that as treasurer he went over the books with the plaintiff, and that the books as made up by plaintiff showed that plaintiff had received from sales of beer about \$6,900. This, with the \$5,000 cash paid in by defendant for his stock, made \$11,900. This was not sufficient, however, to keep things going, so the association borrowed \$6,000 more from defendant, making \$11,000 in all that defendant paid into the treasury of this association. Plaintiff testified that between July, 1905, and February 17, 1906, he and Gavin and defendant met on numerous occasions in Omaha and Crete "and talked and planned about engaging in the brewery business at Crete." According to his statement, these interviews began a month after the corporation had been formed, and ended nearly five months before Knabe says Heink and Lewis had ever met. Plaintiff further testified that on or about February 17, 1906, the three met again in the office of the association in Crete, and that it was there mentioned that the income from the business would not be sufficient to pay plaintiff and Gavin, and that they both stated that they would have to have money for their services, or "we could not live;" that defendant then said, "'Of course, you two men have families to support, and I will pay your salaries out of my own pocket.' He, Lewis, at that time, agreed to pay me out of his own means \$75 a month for my services as superintendent and brewmaster of the business, and to pay Patrick Gavin \$100 a month for his services as manager of the business. Under this promise of Lewis I went to work." If the testimony of Knabe be true, then plaintiff commenced to work 4½ months before he had ever met defendant. Plaintiff says that he continued to work under that agreement until January 1, 1907, when he told Lewis that he had an offer of \$125 a month from a brewery at Wilber; that unless his salary was raised he would quit and

Heink v. Lewis.

go there; that Lewis then agreed to pay him \$125 a month for his services, and that under this oral agreement he worked steadily from January 1, 1907, to June 17, 1907. He testifies that the only money he ever received from Lewis was \$75, \$35 and \$10, or a total of \$120, covering a period of time when, according to his testimony, he would have earned from Lewis nearly \$1,500.

Keeping in mind the declaration which he said he made to defendant that he would have to have money for his services or he could not live, we are next met with the remarkable testimony by plaintiff that defendant told him in January, 1906, which was before the company had commenced to do business, that if he, plaintiff, would advance moneys for work, labor, material, and expenses in the business and construction work, as the payments came due, defendant would personally pay back all the money he had so advanced, and that, pursuant to that agreement, he advanced from time to time in 1906 and 1907 \$750. The first time, according to his testimony, that he made any demand upon Lewis to pay him the salary which had been accruing was in December, 1906, at which time he says defendant told him that when he sold his Dakota and Kansas land "he would pay me, and pay me everything back." He further testifies that on January 10, 1907, defendant showed him all the papers in his proposed land deal in Dakota and Kansas; that these papers were already made out to transfer the property; that defendant then told him that when he got the money from these lands he would pay him. He testifies: "I told him that I would not wait any longer, and went out. He came and called me back into the office, and told me if I would stay he would pay me, and also pay me extra for the trouble I had been put to." He also testifies that Knabe and Gavin were there at the time. Knabe flatly denies any such conversation. Weber, a man who worked at one time for the association, testified to having two interviews with Lewis in Omaha in March or April, 1907. He says: "I telephoned Lewis, and he said he was ready to close the land deal and he was to come down and

Heink v. Lewis.

pay us off;" that by "us" and "we" he meant Heink and himself. He further testified that the work he did was for the association; that the association paid for part of his services, and Lewis promised to pay the rest of it, if he stayed; that President Heink paid part of his services; and on redirect he was asked, "Do you know from whom all the money came," to which he answered, "Most money came from the bar and saloon up in town." Gavin testified that he was present when Lewis and Heink talked about Heink's salary as brewmaster about April, 1906, and in January, 1907; and that "Mr. Lewis told Mr. Heink that he would pay his wages and not wait for results, or returns. Q. Can you give the exact language? A. That is all I can. I can only say what Lewis said, that he would pay his wages, \$75 a month, and that was very distinct." He fixed the date of the second conversation as very early in January, 1907, at which time he says Heink came down to Omaha and wanted his wages; that the interview was in Mr. Lewis' office; that Mr. Lewis answered him "and said he did not have the money just yet, that he had papers made up;" that he said, "I will pay you as soon as I sell this land of which I got the papers ready," and that he showed them the papers. He also testifies that at the time Heink was talking about leaving, Mr. Lewis said, "Mr. Heink, I cannot afford to have you leave me now at any price, and I will give you \$125 if you will stay, because it will ruin me if you should quit now;" that that conversation was in the early part of January, 1907. He also testifies that neither he nor Heink got any salary from the brewing association; that they paid out the money they took in for help and material, and did not retain anything for themselves.

For the defense, defendant himself denied ever having in any manner agreed to pay the salaries of Heink or Gavin out of his personal funds. He admits that he was present at some of the times testified to by Gavin, but positively states that he made no promises to pay personally any of those accounts; that he subscribed

Heink v. Lewis.

\$5,000 for stock and paid the same in full, and that he paid that money to the association; that during all of the time Heink was in the absolute control of the brewing association at Crete; that there was a saloon connected with the brewing association; that he never collected any of the money that came into that saloon; that he borrowed money on his farm in South Dakota to the amount of \$4,000 and turned that over to the association; that the whole amount he turned in would reach the sum of \$11,000, \$5,000 of which was for stock and the other \$6,000 a loan; that the talk between himself and Heink and Gavin was that they should receive their salaries from the income of the brewing association at Crete. "Q. What did they say to you about getting their salaries from the brewing association? A. I was furnishing money to the brewing association. I was trying to raise some money. I told them as soon as that money was raised I would pay it into the association and they could be paid. That was all there was to it. That is the whole conversation that occurred between us." These statements by Mr. Lewis are fully corroborated by Mr. Knabe, who also testified that Heink never at any time intimated to him that Lewis was to pay his salary; that at the time Heink had the proposition from the brewery at Wilber they talked the matter over, and Heink said he had been offered a salary of \$125 a month, "and he said in the same conversation that he did not like to accept that salary, inasmuch as he had been connected with this brewing association, and had been one of it, and I told him that I did not think it would be right for him to do that, and he said he did not think so either. So he said, however, that instead of accepting that salary which they had offered at Wilber, if the brewery at Crete could pay him \$75 a month he could get along, and he would get along and continue as brewmaster;" that at that time witness was vice-president. He says further: "I told him that, if it was satisfactory to him, to accept the \$75 a month, that I thought that the brewing company would pay him

that amount, and that I would at once send him his half-month's salary, which I did. I sent that to him myself." He then testified that he purchased a draft at the United States National Bank for \$37.50 for the half-month's salary and sent it to plaintiff; that in two weeks from that time he sent him another draft from the same bank for a like sum. He also testifies that the \$75 and \$35 and \$10 which plaintiff claims to have received from Lewis were sent to plaintiff by the witness, the \$75 in the two drafts above noted; that he gave him \$35 in cash at another time, and sent him a check for \$10, which check was introduced in evidence, and that this money was sent to him on the part of the Western Brewing Association; that Heink had charge of the brewery and collected all of the moneys, with one or two exceptions, when Mr. Gavin made the collections and deposited the same in the bank; that the \$750 deposited in the bank by Heink was money which Heink had collected from the sale of beer, and that Heink never at any time told him that he had advanced \$750 of his own money for the benefit of the association; that he had a number of conversations with plaintiff about his salary, and that plaintiff at all times expressed himself as satisfied with the arrangement. He testifies: "He was still satisfied that the business was going along all right, and in the end it would be a profitable business for him and for all of us. * * * He never mentioned anything to me that he was dissatisfied. * * * He was not so much interested in the salary as he was in the business, that the business would be a success, that the brewing company would be a success. He was not so much interested in the salary. * * * Q. Did he in any of those conversations make any claim that Mr. Lewis should pay his salary, or at any other time? A. No, sir; never. Q. But it was to come from the brewing association? A. Certainly;" that plaintiff worked for the association until May or June, 1907. "Q. And that was, as you testified, \$75 a month? A. Yes; that is the arrangement we had. He talked to me about it and said he had to have some-

Heink v. Lewis.

thing to live on, and I told him I thought that the company might be able to spare that much out of the business, and afterwards I talked with Mr. Gavin about it. It seemed to be agreeable to everybody, to both Mr. Gavin and I." The witness was then shown two papers purporting to be copies of the minutes of two meetings of the company, one dated July 10, 1905, and the other November 18, 1905, each of which recited that the directors present were "P. A. Gavin, Otto Heink, T. F. Lewis." He was asked if they were in his handwriting. He answered that they were, but testified that Lewis was not present at those meetings; that those copies were drawn at the request of Mr. Gavin, who stated that he wanted to use them in connection with a case at Wilber where the brewing company had a suit, and that he made them as suggested by Gavin; that Gavin dictated the form; that they were not correct copies of the minutes so far as Lewis was concerned, as "he was not there;" that he did not copy them from any book or from any writing of any kind, but prepared them in the form desired by Mr. Gavin. These papers were received and read in evidence. Mr. Lewis was recalled and testified that he was not a director at any time during 1905, that he was not present at either of the meetings referred to in the two exhibits, and that he never at any time paid any money to plaintiff on his salary as brewmaster of the association. Mr. Gavin, being recalled by plaintiff, testified that the two exhibits referred to were prepared to show in court at Wilber that the corporation was in existence; that they were made from a copy of the minute book; that the testimony of Mr. Knabe that he, Gavin, suggested the contents of the exhibits was not true; that Knabe got the contents of exhibits 4 and 5 from the minute book of the association; that Mr. Lewis was present at the two meetings of July 10, 1905, and November 18, 1905; that the others present were Heink and himself; that Lewis was always in the company from the very start.

The above, in substance, is the testimony given upon the trial, and it is now insisted by plaintiff that this tes-

timony was conflicting, that there is ample testimony for the plaintiff to sustain the verdict, and that this court cannot disturb the same. So far as the oral testimony of the witnesses for the respective sides is concerned, this contention is sound, and, if the case had to stand upon this testimony alone, the judgment of the district court would have to be affirmed; but there are facts and circumstances established by the evidence given by plaintiff and his witnesses which thoroughly impeach their testimony, viz.: (1) Plaintiff who, as a foundation for his claim, testified that he told defendant that he would have to have a salary or he could not live, according to his own testimony continued to work from February 17, 1906, to June 17, 1907, until he had earned nearly \$1,500 in salary, and during all that time received from defendant only \$120. (2) Without any money to pay for his stock, and without any money to live upon while performing the services as brewmaster, he claims to have advanced \$750 in cash for the association. (3) That defendant, after paying the \$5,000 in cash for stock, and after having loaned the association \$6,000 in money in addition thereto, agreed to pay out of his own private funds the salary of the two highest priced officials in the association. This testimony is so incredible and so contrary to every human probability as to carry with it its own refutation. It is beyond belief that any man of sufficient business ability and sagacity to accumulate an estate which would enable him to advance \$11,000 to this association would in addition thereto enter into so improvident and absurd an arrangement; and this, too, in the face of the fact that he must have known that, as testified by Mr. Gavin, the association was then taking in about \$400 a month for the sale of beer. The injustice of this claim is too patent to be overlooked by this court. The testimony of the witnesses, when considered in the light of the facts and circumstances disclosed in the record before us, satisfies us that plaintiff and Gavin and Knabe organized this brewing association purely upon "high finance" lines. They organized it without money, first borrowed

money from defendant, then induced him to become a member, obtained all the money possible from him, amounting to \$11,000, collected all the money from the sale of beer, amounting to nearly \$7,000 more, and now, after the brewery has been destroyed by fire and their high finance bubble thereby exploded, they seek to fasten upon defendant compensation, under the guise of wages, for the period of time when they were conducting the affairs of this association, which, as testified by Mr. Knabe, at that time had "nothing except prospects." We think the facts and circumstances above outlined, together with the testimony of defendant and of the witness Knabe, when viewed in the light of reason and common sense, completely outweigh the testimony given in support of plaintiff's claim, and that Mr. Lewis stated the whole case in a nutshell when he testified, "I was furnishing money to the brewing association. I was trying to raise some money. I told them as soon as that money was raised I would pay it into the association and they could be paid. That was all there was to it. That is the whole conversation that occurred between us." Moreover, it is incredible that plaintiff, who, according to the uncontradicted testimony, had sole charge of the business at Crete and collected nearly \$7,000 from the sales of beer, would, in his impoverished condition, go from February 17, 1906, to June 17, 1907, without using any portion of the moneys received from such sales, as his own compensation, when all that he had received from both defendant and Knabe during all that time was the pittance of \$120. We are satisfied that the jury never took into account the strong corroboration of defendant's testimony by the facts and circumstances above outlined. Had it done so, it seems clear to us that they never would have arrived at the verdict returned in this case. Even though the oral testimony in a case be sufficient to sustain the verdict of the jury or a finding by the court, when such verdict or finding is so at war with common experience and surrounding circumstances as to render it unworthy of belief, an appellate court is not bound by such

Everson v. Hurn.

verdict or finding, and will not hesitate to reverse the same. *Richardson v. Richardson*, 45 Ill. App. 362.

This court is ever loath to interfere with the verdict of a jury which is based upon competent evidence and has received the approval of the district court; but, where an examination of the oral testimony presented, and of the undisputed facts and circumstances surrounding the transactions testified to, satisfies us that such verdict is unjust, and that the jury must have arrived at their verdict by considering the oral testimony alone, to the exclusion of such facts and circumstances, it is our duty to interfere and grant a new trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN EVERSON, APPELLANT, V. JAMES M. HURN ET AL., APPELLEES.

FILED JUNE 26, 1911. No. 16,512.

1. **Wills: CONTEST BY INFANT: ATTORNEY'S FEES.** Where an infant son has been disinherited by the will of his father, deceased, it is proper for the mother or other near relative to institute proceedings in the interest of the minor to contest such will, and to employ counsel therefor; and in the event of such contest proving successful the estate acquired for the minor thereunder is properly chargeable with a reasonable compensation for the services of the attorney in such proceeding.
2. ———: ———: ———. But where in such a case the persons employing such attorney agree with him that he shall receive for his services in that behalf one-third or one-half of the recovery in such contest proceeding, such agreement will not be sustained and the estate recovered for such minor charged therewith, unless it appears that such proportion of the recovery does not exceed a reasonable compensation for the services so performed by such attorney.
3. **Infants: ATTORNEY'S FEES.** And in such a case it is the duty of the court, even if no defense is interposed in behalf of such minor,

Everson v. Hurn.

on its own motion, to protect the interest of such minor by refusing to permit a recovery for more than a reasonable compensation for the services so rendered by such attorney.

4. **Attorney and Client: RIGHT TO MORTGAGE: INFANTS.** And where in such a case it appears that such contest was compromised for \$1,500, and that the attorney received in consummation of such agreement a mortgage aggregating in principal and interest \$1,215 and a note for \$285, and that by the terms of the settlement of such contest it was agreed that said mortgage was to be the property of the minor, and that the attorney was to receive the proceeds of said note for \$285 as full compensation for his services, and that said note upon its maturity was paid to said attorney, his possession of such mortgage is simply as attorney for said minor, and he does not, by such possession, become vested with any interest therein, nor does he thereby acquire any right to maintain, in his own name, a suit for the foreclosure of such mortgage.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Everson, pro se.

J. G. Thompson and Thomas & Shelburn, contra.

FAWCETT, J.

Plaintiff is a practicing attorney. Lee C. Willits was the father of defendant Edward L. Willits, who is a minor five years of age. The father departed this life, testate, in September, 1907. Prior to his death he had been divorced from his wife, the mother of Edward L. By his will he disinherited his infant son. The will named defendant Conklin as executor, who duly qualified as such. Among the assets which came into the hands of the executor was a mortgage for \$1,200 executed by one Hurn and his wife. Hurn subsequently sold the property covered by the mortgage to defendant Dow, he assuming and agreeing to pay the mortgage debt. Dow was appointed guardian for the infant defendant, Edward L. Willits. After the death of Willits, Sr., plaintiff was employed by one Simpson, grandfather of Edward L. Willits on his mother's side, to

contest the will of Lee C. Willits, the mother of the infant defendant consenting thereto. It is alleged by plaintiff that when he was so employed by Simpson it was understood and agreed that he was to receive for his services from one-third to one-half of the recovery in such contest. Plaintiff filed objections to the will in the county court, but on the hearing offered no evidence in support of his objections and the will was sustained by that court. Thereupon plaintiff appealed the contest proceeding to the district court. Before any hearing was reached in that court, the contest instituted by plaintiff was compromised and settled between plaintiff, acting for the minor, and the executor and his attorneys, acting for the estate of Lee C. Willits, and the determination of what constituted the terms of that settlement determines this case. The amount which the executor and his attorneys agreed to pay in such settlement was \$1,500, which was paid to plaintiff by delivering to him the mortgage above referred to, upon which there was \$15 accrued interest, and the personal note of Dr. Conklin, the executor, for \$285.

After this settlement had been made, plaintiff claims that the grandfather, Simpson, and the mother of the minor called at his office, and it was then and there agreed that of this \$1,500 Edward L. Willits should have \$800 with accruing interest thereon, and that plaintiff was to have the other \$700 with interest accruing thereon; that plaintiff was to hold the mortgage and collect the same and then pay over the \$800 and the interest so agreed upon as the portion of Edward L. Willits. The \$285 note given by Dr. Conklin was to run for 60 days, and was paid by him to plaintiff at its maturity. The mortgage was allowed to run for a year or so, and when plaintiff demanded payment thereof from Dow payment was refused upon the ground, as stated by Mr. Dow, that plaintiff had already been paid more than his services were worth. Plaintiff thereupon, in his own name, instituted the present suit to foreclose the mortgage, setting out substantially the facts above recited, and praying that the

mortgage be foreclosed, the property sold and the money distributed in the proportion as contemplated by his agreement with Simpson and the mother of the infant defendant. Defendant Dow answered, admitting his agreement to pay the note secured by the mortgage and that the same had not been paid, and alleged that he was ready and willing to pay the same, but had received notice that plaintiff was not the legal owner and had no interest in said note and mortgage. J. G. Thompson, Esq., as guardian *ad litem* for the minor defendant, Edward L. Willits, answered, alleging that said minor defendant "is the owner of said note and mortgage," and denied all other allegations in the petition. The reply was a general denial. Upon a trial to the court, the court found that the minor defendant, Edward L. Willits, is the owner of the note and mortgage, and that plaintiff has no interest therein, dismissed plaintiff's suit, and entered a decree of foreclosure in favor of the minor defendant, Edward L. Willits. Plaintiff appeals.

Several questions are strenuously argued by plaintiff in his brief, but, as the judgment of the trial court must be affirmed upon one controlling point, we deem it unnecessary to consider any of the other questions presented. When the settlement of the contest was made, the executor turned over to plaintiff the note and mortgage above described. Plaintiff testified substantially to the matters set out in his petition, and upon cross-examination expressly denied that the \$1,200 mortgage was to be the sole property of the minor, Edward L. Willits, or that he (plaintiff) was to accept the \$285 note as full compensation for his services. For the defendants, J. G. Thompson and Gomer Thomas, the attorneys who represented the executor in the will contest, and the executor himself, Dr. R. E. Conklin, all three testified that by the terms of the settlement of the will contest the \$1,200 mortgage was to go to the minor, Edward L. Willits, and that plaintiff was to look to the excess over that mortgage for his services in the litigation then concluded; that, instead of re-

ceiving such excess in cash, he took Dr. Conklin's note for \$285, due in 60 days, which note was at its maturity paid to plaintiff by Dr. Conklin. It was upon this testimony that the trial court found that plaintiff had no interest in the note and mortgage. In this we think the trial court was right. The agreement of the grandfather and mother of Edward L. Willits to pay plaintiff one-half of the amount recovered, or within \$50 thereof, could not bind the minor, unless it were established by a preponderance of the evidence that such an allowance for attorney's fees was reasonable. While it was perfectly proper for the grandfather and mother of the minor to institute proceedings to contest the will of Lee C. Willits in the interest of his minor son, who had been disinherited by him, they could not bind the minor, or any estate which he might acquire through such contest proceedings, for anything more than reasonable compensation to the attorney so employed; and it is the duty of the court in such a case, where proceedings are instituted to recover for services so performed, even if no such defense is interposed, on its own motion, to limit the recovery of the plaintiff in such a proceeding to a reasonable compensation for the services rendered. The evidence shows the services performed by plaintiff, and that he had been paid the sum of \$285 therefor; and by a clear preponderance of the evidence it was established that he agreed to accept that sum as full compensation for such services. It was likewise established by a clear preponderance of the evidence that he accepted the note and mortgage in controversy, as attorney for the minor, Edward L. Willits, and that in receiving such mortgage there was no understanding and agreement by any one authorized to so bind the defendant Edward L. Willits, that plaintiff should have any interest in such mortgage.

It follows that in holding that plaintiff had no interest in the note and mortgage in controversy and in dismissing his action the district court was right, and its judgment is

AFFIRMED.

WILLIAM J. AINLAY V. STATE OF NEBRASKA.

FILED JUNE 26, 1911. No. 17,002.

1. **Criminal Law: ADMISSION OF EVIDENCE: HARMLESS ERROR.** "The reception of incompetent evidence tending to establish a certain fact is not prejudicial error when the same fact is conclusively established by competent evidence." *Fike v. Ott*, 76 Neb. 439.
2. ———: **WITNESSES: EXAMINATION: DISCRETION OF COURT.** "How far, if at all, a party shall be permitted to cross-examine, or put leading questions to his own witnesses, where they appear to be hostile or unwilling, is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624.
3. ———: **EVIDENCE.** In a prosecution for gambling, where the case for the state rests largely upon the testimony of witnesses who have been guilty of a like offense, and the court properly instructs the jury as to the weight to be given the testimony of such witnesses, and the testimony given by such witnesses is sufficient to sustain the verdict of the jury rendered thereon, the verdict will not ordinarily be disturbed in this court, even though such testimony be contradicted by the accused.

ERROR to the district court for Gosper county: ROBERT C. ORR, JUDGE. *Affirmed.*

E. T. Grunden and Ritchie & Wolff, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

FAWCETT, J.

Defendant was convicted in the district court for Gosper county of the crime of gambling, and sentenced to pay a fine of \$150 and costs of prosecution, from which he prosecutes error to this court.

The giving of instruction No. 7 is assigned as error upon the ground that "there is absolutely no evidence to justify, or even excuse, submitting such an issue." By

this instruction the jury were told: "If you find from the evidence in this case that the defendant has endeavored to prevail upon any witness to abscond, or has procured his absence, or has endeavored to induce him to testify falsely, or has concealed the whereabouts of such witness from the prosecution, such conduct on the part of the defendant is an incriminating circumstance to be weighed by the jury in determining the question of his guilt." Plaintiff was accused of gambling in the house of John Collier. Collier was himself arrested for keeping a gambling house, pleaded guilty and paid a fine. Immediately thereafter, and while a warrant was out for defendant, Collier and his son, Walter, suddenly left Elwood. The county attorney had a subpoena issued for them, but it was returned unexecuted. The evidence of young Collier shows that he and his father went first to Holdrege, where they saw defendant, and then to the town of Funk, arriving there shortly before noon. They put up at the hotel, where they had dinner, supper and lodging. In the morning they were advised that they were wanted at the telephone. Young Collier answered the call. He testified that the substance of the call was that they "had better come back to Holdrege," because the party thought they "would be subpoenaed on the case." The testimony of the father and of the hotel-keeper is that the two Colliers left before breakfast. They started on foot and walked about four miles, when they were met by defendant in a buggy, who took them to Holdrege and to his home, where they remained that day and night, and then went to the town of Wilcox, where they remained from one to two days, and then returned to Holdrege. When asked why they went to Wilcox, young Collier answered, "Because we wanted to go there." No other reason is given for their trip to Holdrege, Funk or Wilcox. When asked if he was surprised when defendant met him with the buggy, he answered: "No." "Q. So you were expecting to see him, were you? A. Yes, sir. Q. He told you that he would meet you with a

team, didn't he? A. I think it was stated that he would." When they got back to Holdrege from Wilcox, they learned that defendant's preliminary examination was over, and they then returned to Elwood. We think this evidence was ample to warrant the giving of instruction No. 7. Counsel objects to this instruction for the further reason that the court told the jury that such conduct on the part of the defendant "is an incriminating circumstance to be weighed by the jury in determining the question of his guilt." It is argued that this submitted only the question of defendant's guilt, and not that of his guilt or innocence. In other words, that the words "or innocence" should have been added. We think this criticism is without merit. The words "in determining the question of his guilt" are tantamount to saying "in determining the question as to whether or not he is guilty."

It is further urged that the court erred in permitting the county attorney, while upon the stand as a witness, to testify that he went to the telephone office in Elwood and examined the record of calls from Elwood to defendant at Holdrege on the afternoon of February 20, the day the Colliers first reached Holdrege, and that the book in the telephone office for that date showed a call to defendant at Holdrege from one McDonald, who it is claimed participated with defendant in the poker game for which defendant was being prosecuted. We think this evidence was improperly received, but its admission was not error, for the reason that this same matter had already been properly shown by the operator in charge of the telephone office on that day. *Fike v. Ott*, 76 Neb. 439.

Instruction No. 5 is objected to for the reason that it submitted the issue that "defendant did unlawfully play a game of cards for * * * other property of value." It is urged that this is wholly unsupported by evidence; that this instruction permitted finding defendant guilty of playing with any person; that its first paragraph reads, "Milton Winslow or other persons," while the information charges him with playing with "Milton Winslow and

with others to affiant unknown." This contention is not worthy of serious consideration.

The trial court is severely arraigned by counsel, who states in his brief: "The action of the court at 1489 in intimidating the witness and conveying to the jury his desire that they convict." The witness upon the stand was troubled with a very defective memory. To nearly every question asked him he answered that he couldn't remember. The record shows: "Q. Did you play poker during that time—the year 1908—or any other card game for money with Mr. Milton Winslow or William J. Ainlay? A. Not that I remember of. Q. Did you or did you not? A. I can't recollect. I don't remember. Q. I want an answer to that question, one way or the other. (Witness hesitates.) 1489. The Court: I want you to answer that question. You may take all of the time you want to think it up." This is the language used by the court which causes counsel to say that the court was trying to intimidate the witness and to convey to the jury his desire that they convict. The action of the court at 1491 and 1492 is also assailed. After the court had told the witness at 1489 that it wanted him to answer the question, but that he might take all the time he wanted to think it up, the record proceeds: "Well, I can't remember. 1490. That is not the answer. Will you say that you did or did not in Collier's place or house in Elwood, Nebraska, during the year of 1908, play cards or a game of poker or any other game for money with Milt Winslow or William Ainlay? Now, answer that question by yes or no." This was objected to, when the court said: "Now, I want you to answer that question." Counsel excepted to this statement of the court. By the witness: "Well, I can't answer it by yes or no, because I don't remember. Q. I insist on getting an answer to that question before he leaves the witness-stand. The Court: Have you any further answer to make to that question?" He was then asked by counsel for the state to say yes or no, when he answered: "I can't when I don't know."

This closed the incident. It is trifling to urge that the court was guilty of any misconduct in what we have just narrated.

In attempting to make out the case for the state, counsel was obliged to rely upon witnesses friendly to defendant, and who, the evidence fairly indicates, were in the habit of engaging in "games" themselves, and in the course of their examination he subjected them to what would ordinarily be termed quite rigid cross-examination. This is strenuously objected to; but under the peculiar conditions surrounding this case we do not think the court abused its discretion in that regard. The question as to how far, if at all, a party shall be permitted to cross-examine or put leading questions to his own witnesses where they appear to be hostile or unwilling is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448; *Welsh v. State*, 60 Neb. 101.

The petition in error contains over 800 other assignments of error, which time forbids considering in detail. Suffice it to say that we have carefully read the entire record and the briefs of counsel, and are unable to discover any reversible error in the rulings of the court upon the trial.

Finally, it is urged that the verdict is not sustained by the evidence. The conviction in this case rests quite largely upon the testimony of one Harry Sugdon, who admitted that he had been arrested for running a gambling room, and that the county attorney had promised him that, if he would testify in this case against the defendant, he would not be fined or imprisoned. Defendant positively denied the testimony of Sugdon, but the latter is corroborated to a considerable extent by other witnesses in the case, as well as by the action of defendant in aiding the Colliers to keep away from Elwood until after the preliminary examination. In charging the

Struble v. Village of DeWitt.

jury, the court properly advised them as to the weight to be given to the testimony of the witness Sugdon, in the light of the admissions made by him as above outlined; and also carefully advised them as to the weight of the testimony of any witness who claimed to have played for money with the defendant. The jury, with these matters fully explained to them, found the defendant guilty, and we are unable to say from the record before us that their verdict is not sustained by sufficient evidence.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

MATILDA STRUBLE, APPELLEE, V. VILLAGE OF DEWITT, APPELLANT.

FILED JUNE 26, 1911. No. 16,235.

1. **Appeal: LAW OF THE CASE.** Upon the first trial of the case defendant objected to an instruction given by the court, and prepared and offered an instruction in lieu thereof. Upon appeal this court reversed the judgment for error in the instruction given, and in refusing the requested instruction. Upon a second trial the court gave the instruction formerly requested by defendant and approved by this court. *Held*, That upon second appeal of the same case this court will not reverse the judgment because of alleged error in said instruction.
2. **Damages: INJURY TO MARRIED WOMAN.** A married woman who is accustomed to receive compensation for services rendered and work performed for others than her own family may contract for medical services or other necessities for herself and family, and in an action by her to recover damages for personal injury it is not error to instruct the jury that she can recover "such amount as she has necessarily expended for medical care," and that they should include "such reasonable charges as she has incurred and become obligated to pay."
3. **Evidence: NONEXPERT EVIDENCE: PERSONAL INJURY.** Nonexpert witnesses are competent to testify as to circumstances and conditions that any person of ordinary intelligence might observe,

Struble v. Village of DeWitt.

witnesses may testify whether a person who has been
id with whom they were familiar, appeared to be
ain, the appearance of her injury, and similar matters
y them tending to show the nature and extent of the

PERSONAL INJURY: QUESTION FOR JURY. When the evi-
onflicting as to whether physical conditions existing
after a personal injury were caused or affected by
r, the question should be submitted to the jury upon
vidence.

CONFIDENTIAL COMMUNICATIONS. When part of a con-
ommunication between physician and patient is put in
y one party, the other party may give the whole com-
"on the same subject." The trial court must deter-
her the evidence offered is on the same subject, and
will not be regarded as erroneous unless there is a
: of discretion.

**Corporations: DEFECTIVE SIDEWALKS: CONTRIBUTORY
: DIRECTING VERDICT.** In an action against a municipi-
ation for injuries sustained by a fall upon a defective
'act that the person injured had passed over the same
al times before the accident, and might have avoided
by taking another way, and was in a delicate physical
and was carrying articles which made it more difficult
he accident, will not constitute such evidence of con-
negligence as to require a peremptory instruction for
ant.

EVIDENCE. A verdict for \$25 for "medicine, doctor's bills
s bills" will not be set aside as unsupported, although
o evidence that any nurse's bills have been incurred,
ce being sufficient to support a verdict in that amount
r's bills" incurred.

—. A verdict for \$200 for "permanent injuries" will
aside as unsupported if the evidence justifies a finding
s in that amount for injuries sustained as alleged.

om the district court for Saline county:
URD, JUDGE. *Affirmed.*

Brown and Venrick & Green, for appellant.

Bartos and Hall, Woods, Bishop & Pound,

SEDGWICK, J.

The plaintiff obtained a verdict and judgment in the district court for Saline county against the defendant for damages resulting from a fall upon a defective walk in the defendant village. The defendant has appealed.

1. The first contention of the defendant is that the court erred in giving the following instruction: "The defendant is not required to have the sidewalks so constructed or maintained in such condition of repair as to secure absolute immunity in using them, nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution." The criticism is that the jury should not have been told that the village was required absolutely "to see that its sidewalks are reasonably safe," but the village is only required to use reasonable diligence in that regard. If the instruction complained of was the only one defining the duty of the village there might be some ground for this criticism. The court, however, correctly instructed the jury as to the necessity of notice to the defendant of the defective condition of the walk, or circumstances which would imply such notice, and that the plaintiff could not recover unless the jury also found from the evidence that the defect in the sidewalk was caused "by the failure of the officers of the defendant village to use reasonable diligence to keep the walk upon which plaintiff received her injuries in a reasonably safe condition for use by persons passing over it using ordinary care and prudence."

It must also be considered that an instruction in the language complained of was approved by this court in *City of Lincoln v. Smith*, 28 Neb. 762; *City of Beatrice v. Reid*, 41 Neb. 214; *City of Aurora v. Cox*, 43 Neb. 727, and in *Anderson v. City of Albion*, 64 Neb. 280.

From the opinion in this case upon a former appeal (81 Neb. 504) it appears that upon the first trial in the district court the defendant village requested the court to give the

Struble v. Village of DeWitt.

tical instruction now complained of, and in considering the instruction this court in the opinion said that this instruction, and another one there mentioned, "correctly stated the law, were in point, and should have been given." The trial court accordingly upon the second trial gave the instruction which had been requested by the defendant and which had been approved by this court, and the defendant cannot insist in this case that the court erred in so doing.

It is contended that the court erred in instructing the jury as to the measure of damages. That part of the instruction objected to is as follows: "The measure of her damages is such amount as she has necessarily expended for medical care and nursing and medicines. As to these damages it is not necessary that she should actually have paid for them, but you are entitled to include such reasonable expenses as she has incurred and become obligated to pay." The plaintiff is a married woman, and it is stated in the opinion that "the testimony fails, absolutely, to show that she possessed of any separate estate." This, it is said, brings the case within the rule laid down in *Pomerene Co. v. White*, 70 Neb. 177, and the following is quoted from the majority opinion in that case: "In an action for personal injuries by a married woman, she is not entitled to recover the value of medical services rendered, in the absence of proof that she has paid for such medical services, or that she is the owner of a separate estate which might be liable therefor. * * *

As the testimony in this case fails to show the existence of a separate estate owned by the plaintiff, or that she has actually expended any money for medical services, under these circumstances, we are compelled to conclude that the right of action for medical services inures to plaintiff's husband and not to her, and that the instruction submitting this element of damages to the jury is unsupported by the testimony."

The defendant says that the testimony shows that the plaintiff had contracted a doctor's bill of considerable amount, and that a part of it at least was unpaid at the close of the trial, and that it was error to allow her to re-

cover for these items without showing that she had actually paid them. The services of the physician are necessary for one who is injured or ill, and by our statute both husband and wife are liable for such services when rendered for a member of the family. Undoubtedly, when it is attempted to hold a married woman liable as surety or on some contract not beneficial to her, it is necessary to show that she had some separate estate at the time, to which such contract might relate, as held in *Kocher v. Cornell*, 59 Neb. 315. Our statute provides that a married woman may carry on any trade and business and perform any services on her own and separate account, and that her earnings from such business or services shall be her sole and separate property. Ann. St. 1909, sec. 5320. And that any property which she acquires by purchase or otherwise shall remain her sole and separate property. Section 5317. In *Riley v. Lidtke*, 49 Neb. 139, this court said: "Earnings acquired by the wife as a laundress and seamstress for others than her family do not belong to the husband, but are the sole and separate property of the wife," and it was said that the fact that such earnings were applied to the support of her family did not change the rule. The evidence in this case shows that the plaintiff performed services as a laundress for her physician who attended her and for others, both before and after the injuries complained of, and that she applied some of these earnings in payment of the physician's services rendered at the time of this injury. These earnings would be her separate property and she was competent to contract with reference thereto. The instruction complained of is to be distinguished from the one criticised in *Pomerene Co. v. White*, *supra*, in that it limits her recovery for unpaid medical services to "such reasonable charges as she has incurred and become obligated to pay." There is sufficient evidence in the record from which the jury might find that she had incurred and become obligated to pay for the services of the physician incident to the injury complained of. The instruction therefore was not erroneous.

3. The next contention is that the court erred in receiving evidence objected to by the defendant. About four and one-half months after the injury complained of, the plaintiff gave birth to a child, which lived for only a few minutes, if at all. The physician testified that the child was stillborn. The plaintiff was allowed to testify to her condition at the time of its birth. This testimony was objected to on the ground that there was no evidence tending to show that the conditions then existing were caused by or resulted from the injury complained of. Dr. Wiggins, who was one of the trustees of the defendant village at the time of the accident, at first testified that he did not know what was the cause of the death of the child, but afterwards testified that he did not think that it was in any way caused by the injury complained of, and there was evidence that the plaintiff had at a former time suffered a miscarriage. The plaintiff and several other witnesses who had assisted in caring for her after her injury, but who had no expert knowledge, testified to certain circumstances and conditions resulting from the accident from which the jury might have found that the injury complained of was the cause of her subsequent misfortune. This evidence was objected to upon the ground that the witnesses had not sufficient knowledge to testify, but we think the evidence was properly admitted. The testimony of these witnesses does not relate to matters that require expert knowledge. They testified to circumstances and conditions that any person of ordinary intelligence might observe and understand. The affidavit of Dr. Love appears to have been in evidence, in which he stated that he examined the plaintiff; that he found injuries caused by some violent and external force of such a nature as to render it likely that she could not afterwards give birth to a fully formed child. This question was properly submitted to the jury.

4. It is insisted that the court erred in excluding evidence offered by the defendant. Dr. Wiggins was her attending physician from the time of her injury to the birth of her child. As a witness for the defendant he was asked:

"Q. Now, at any one of those visits at that time did you have any conversation or was anything said as to any previous miscarriages?" The plaintiff's attorney objected to this question on the ground that it related to a privileged communication. The contention is that this was not a privileged communication, because the plaintiff had herself testified to conversations with the physician in regard to her injury, and the condition that resulted therefrom, and as to his treatment and directions. The defendant relies upon the provision of the statute that "when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. * * * And when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Code, sec. 339. The trial court evidently thought that the matter inquired into by this question was not the "same subject" of conversation testified to by the plaintiff, and that it was not necessary to explain that conversation. A considerable latitude must be allowed a trial court in such matters, and we do not think that this was such an abuse of discretion as to require a reversal.

5. The next contention of the defendant is that the plaintiff was guilty of contributory negligence. It is said in the brief "that different minds could not honestly reach different conclusions without reasoning irrationally." It appears from the evidence that the plaintiff had passed over this walk "possibly twice before" the accident, and it is argued that she must have known the condition of the walk and should have walked in the road, as the road was in good condition and she had during a part of her walk, where there was no sidewalk, followed the road. The plaintiff was also carrying several packages, and the burden of these packages may have contributed to her accident. It is difficult to believe that the defendant's counsel is serious in these contentions. If these circumstances

William Baird & Sons, for appellant.

Greene & Greene, contra.

SEDGWICK, J.

The defendant, W. T. Graham, was by the county court of Douglas county appointed administrator of the estate of William Griffin, deceased. The deceased was killed in an accident on the railroad, and under the direction of the county court the administrator settled with the company and received \$3,750 in full payment for the damages caused by the death of his intestate. As administrator he filed his petition in the county court showing that the deceased left no children or descendant, but left a widow, the plaintiff, Margaret Griffin, and asked the court for an order directing the distribution of the money in his hands. The defendant, Jane Bailey, who is the mother of the deceased, appeared in the county court and asked for one-half of the money in the hands of the administrator as next of kin. The court ordered an equal division between the widow and the mother of the deceased, after payment of the expenses of administration. The widow appealed to the district court, and upon hearing in that court the order of the county court was sustained. From the judgment of the district court sustaining the order of the county court she has appealed to this court.

Sections 1, 2, ch. 21, Comp. St. 1909, are as follows: "That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death

In re Estate of Griffin.

shall have been caused under such circumstances as amount in law to felony. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow or widower and next of kin of such deceased person, and shall be distributed to such widow or widower and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the widow or widower and next of kin of such deceased person; provided, that every such action shall be commenced within two years after the death of such person."

There appears to be no dispute in regard to the facts. The only question presented is as to the proper distribution of the funds. There is no proof in the record that Mrs. Bailey, the mother of the deceased, was in any way dependent upon her son for support, or that he had ever furnished her any pecuniary aid. The administrator offered to prove that Mrs. Griffin, the widow of the deceased, "was the only person who was dependent upon said decedent for support, or who received any support from him during his lifetime." This evidence was objected to, and the objection sustained and the evidence excluded. The appellant concedes that if the deceased had been furnishing his mother with support and maintenance, or under the conditions of the family was required to do so, she would have had a pecuniary interest in his life and would have been entitled to her share in the funds in question; but it is contended that it was not the intention of the legislature that the mother is entitled to one-half of the fund merely because she is the next of kin. Such a construction, it is urged, would defeat the beneficent purpose of the statute. "It would enable the next of kin, whether lineal or collateral, whatever

In re Estate of Griffin.

their conditions, to share with the widow the fund, without any reference to the pecuniary injuries which such next of kin might sustain, or without reference to the fact that such next of kin sustained no pecuniary injury. If, in this case, instead of leaving his mother as next of kin, Griffin had left a brother or uncle as his next of kin who was wealthy and in no way dependent upon him for support, present or prospective, can it be possible that it was the intention of the legislature to deprive his widow of any part of the fund in question and give it to such brother or uncle? If the construction which the county court and district court have given to this statute is correct, it follows as a logical conclusion that any widow who is dependent upon her husband for support and maintenance would be deprived of one-half of the fund collected, without any reference to the proximity or dependence of the next of kin." (Brief of appellant.)

It is undoubtedly true that the construction of the statute complained of might in some cases result in injustice. Where the widow is left without any means of support, and the next of kin are in more fortunate circumstances and had no need of any pecuniary assistance from the deceased in his lifetime and have ample means for their own support and maintenance, the purpose of the statute, as manifested in the act itself, would seem to indicate a different basis of distribution. The measure of damages is prescribed in the statute in these words: "In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the widow or widower and next of kin of such deceased person." The widow in such case may suffer much more pecuniary damage than any or all of the next of kin, and this damage is the basis of the recovery, and, if practicable, it would seem reasonable that the money realized should also be distributed on this basis. It does not, however, necessarily follow that the mother has not suffered any pecuniary injury because she has not heretofore re-

ceived pecuniary assistance from the deceased, nor even because she is not now so situated as to be in need of such assistance. A mother is entitled to support and maintenance from her son when she needs it, and, in view of the uncertainties of human affairs, the right to such assistance when needed may be considered of pecuniary value. In some of our sister states the law provides that the jury shall determine in what proportion the damages awarded shall be distributed to the widow and next of kin. This is a difficult and delicate duty and it would perhaps be desirable that the legislature should provide, if practicable, a definite rule. It was held under a statute providing that the jury might determine as to the distribution that, in case the jury failed in its verdict to determine the matter, the statute which required the money to be paid "according to the statute of distribution" must be followed by the courts. *Powell's Adm'x v. Powell*, 84 Va. 415, 4 S. E. 744. See, also, *Grotenkemper v. Harris*, 25 Ohio St. 510, and *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 91. Both of these cases construe statutes identical with our own. The question here is wholly as to the interpretation of our statute. It might be in the interest of justice to make it the duty of the court or jury trying the case to determine the proportion in which the damages recovered shall be distributed, but that is for the consideration of the legislature and not of the courts.

The appellee insists that the court erred in its allowance to the administrator. The case is presented here upon a printed abstract prepared under the recent act of the legislature. It does not appear from this abstract that there was any cross-appeal. The appellee therefore is not in position to question this ruling of the district court.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. MINDEN-EDISON LIGHT & POWER COMPANY,
PLAINTIFF, V. HARRY S. DUNGAN, DEFENDANT.

FILED AUGUST 22, 1911. No. 17,266.

1. **Injunction: SUPERSEDEAS.** A temporary restraining order granted upon an application for an injunction is authorized by statute for the purpose of a hearing when necessary before granting a temporary injunction. An order restraining a party absolutely, without providing for a hearing upon the application, is not a temporary restraining order. It is an injunction, and an order dissolving it may be superseded.
2. ———: **PETITION: JURISDICTION.** A mere technical defect in a petition for injunction will not deprive the court or judge of jurisdiction to determine whether a temporary injunction should be granted. If the allegations of the petition show that the plaintiff's cause of action is within the jurisdiction of the court and is of such a nature that an injunction would be an appropriate remedy, the court or judge is not without jurisdiction. Although the order granting the writ may be irregular or erroneous, it is not necessarily subject to collateral attack for want of jurisdiction of the subject matter.
3. ———: **NOTICE: INDORSEMENT ON SUMMONS.** When a temporary injunction is granted at the commencement of an action, it is not necessary to give any other notice than to indorse the summons, "Injunction allowed," as required by statute. Such indorsement is a sufficient compliance with a condition of the order that it shall take effect when the defendants are notified thereof.
4. ———: **AFFIDAVIT: SUFFICIENCY.** The affidavit for a temporary injunction failed to show that the judges of the supreme court were absent from the county in which the application was made. *Held*, That the order of the county judge granting the writ was not for that reason void for want of jurisdiction.
5. ———: **PETITION: PRAYER: AMENDMENT.** If the prayer of a petition for injunction does not ask for a temporary order, it is irregular to grant such order without amendment of the petition in that respect. Such defect is not jurisdictional, and the plaintiff may supersede an order dissolving such temporary injunction.
6. ———: **POWERS OF COUNTY JUDGE.** A county judge cannot grant a perpetual injunction. If the language of his order purports to do so, it should still be regarded as a temporary injunction, and should not be treated as absolutely void for that reason.

State v. Dungan.

TEMPORARY INJUNCTION; SUPERSEDEAS; REVIEW. In an action in this court to require a judge of the district to set aside the amount of an undertaking to supersede his order for a temporary injunction, this court cannot consider the controversy in the original action. For by the statute, a temporary injunction may be granted until the final hearing by giving the proper

undertaking for a writ of mandamus to compel the judge to set aside the amount of a supersedeas bond. *Objection for writ overruled.*

for plaintiff.

Reversed, contra.

On the 11th day of July, 1911, an election was held in the city of Minden, a city of more than 1,000 and less than 5,000 inhabitants, upon the question of issuing bonds of the city in the sum of \$15,000 "for the purchase, construction and establishment of a lighting system in and for said city." The election having resulted in favor of issuing the bonds, this plaintiff began an action in the district court for Kearney county to enjoin the issuing of the bonds and for other relief. An order was made by the county judge enjoining the defendants as prayed in the petition. A few days later a motion was filed by defendants to "dissolve or vacate the injunctive order issued against these defendants" upon four several grounds stated in the motion as follows: "First. For that said injunctive order issued by the county judge is void and of no effect for the reason that the prayer of the petition does not ask for either a temporary injunction or a temporary restraining order. Second. For that said injunctive order was issued upon the condition that notice was to be given to these defendants, which was not done other than the regular summons served on them. Third. For

that said injunctional order so issued by the county judge is void in that it is uncertain and indefinite in its terms. Fourth. For that the petition does not state facts sufficient to state cause of action for the issuance of any injunctional order." A hearing was had upon this motion before the judge of the district court at chambers, who found that "the facts stated in the petition do not constitute a cause of action," and that the affidavit for the injunction was insufficient because it did not show "that there were no supreme judges or judge in said county" when application was made to the county judge, and "that there was no prayer for a temporary order of injunction, or temporary restraining order in the petition," and, for these reasons, the county judge was "without jurisdiction to issue any temporary order of injunction on the affidavits, prayer and petition of plaintiff." Upon these findings, the judge of the district court made the following order: "Wherefore it is ordered, adjudged and decreed that said temporary order of injunction be and the same is hereby declared to be void and of no effect, and that the petition does not state facts sufficient to constitute a cause of action, and the same is therefore dissolved and said petition hereby be and the same is dismissed, to which findings and orders the plaintiff excepts." The plaintiff then asked the judge "to fix a bond superseding said temporary order of injunction." The judge refused "to fix any bond superseding said injunctional order," and stated as a reason therefor that "the said order issued by the county judge was for the reasons hereinbefore set out void and of no effect." The plaintiff then applied to this court for a writ of mandamus to require the judge to fix the amount of a supersedeas bond. Upon agreement of the parties briefs have been filed and oral arguments were heard upon this application.

The provision of the statute relied upon in this application is as follows: "That in case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction, which has been or may

hereafter be granted, the court or judge, so dissolving or modifying said order of injunction, shall at the same time fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act, or acts, the commission of which was, or may be, sought to be restrained by the injunction so dissolved or modified." Code, sec. 679. The code also provides that under certain circumstances the county judge may grant a temporary injunction. "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or in the absence from the county of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." Code, sec. 252. The action of the judge of the district court in refusing to fix the amount of the supersedeas bond, it will be seen from the foregoing statement was upon the theory that the county judge was without jurisdiction to make the order allowing the writ. It was also contended upon the argument that, if it should be found that the county judge had jurisdiction to make the order, then the order as made must be construed to be a temporary restraining order only, and in that case the judge of the district court might refuse to continue it and the plaintiff would not be entitled to a supersedeas.

1. The first question, then, which we will consider is as to the form of the order entered by the county judge. If it is considered that the county judge had jurisdiction to make the order, should that order be construed as a temporary restraining order only or as an order granting a temporary injunction? It has been held that if the effect that should be given to the order of the county judge is doubtful, or if the language of the order will admit of such construction, then it should be considered as a temporary restraining order only. *State v. Graves*, 82 Neb. 282. This holding seems to be upon the theory that it

State v. Dungan.

cannot ordinarily be necessary that the county judge should do more than restrain the acts complained of until a hearing can be had in the district court, which has complete jurisdiction of the matter. The condition of the statutes upon this subject suggests the possibility that, if the attention of the legislature had been challenged directly to the matter, the confusion resulting from the improper granting of temporary injunctions by county judges would have been avoided by limiting their jurisdiction to the granting of temporary restraining orders only. The court, however, must take the statute as it finds it and ascertain, if possible, the intention of the legislature. It has been considered and determined in very many cases that the legislation upon this subject has made a definite distinction between a restraining order and a temporary injunction. The earlier decisions have also established some rules which must be adhered to by the courts in the absence of further legislation. In *State v. Baker*, 62 Neb. 840, the following rule was established: "The chief distinguishing feature of the two writs is that the temporary restraining order contemplates a further hearing on the application for a temporary injunction upon notice to and a hearing by the adverse party on such application." In *State v. Graves*, 82 Neb. 282, this rule was adhered to and stated perhaps in more definite terms as follows: "An injunctional order which does not contemplate a hearing as to whether a temporary injunction shall be allowed is of itself a temporary injunction, and must be so treated. An order dissolving such injunction may be superseded." The order of the county judge in this case is absolute, and does not contemplate any hearing as to whether a temporary injunction should be allowed, and is therefore within the rule established in the cases quoted, and clearly is not a temporary restraining order. If it was made with jurisdiction, and is to be given any force and effect, it must be regarded as a temporary injunction. If the order amounts to a temporary injunction, and the county judge has jurisdiction to make it, the plaintiff was,

f course, entitled to continue it in force until the final hearing of the cause, and for that purpose was entitled to an order of the district judge fixing the amount of the bond to be given to supersede his order of dissolution. Section 679 of the code is clear and positive, and is to that effect.

2. As a reason for supposing that the county judge was without jurisdiction in this case, it was urged that the petition for the injunction fails to state a cause of action. It must be conceded that, if the character of the petition was such that under no circumstances could an injunction be allowed upon such a supposed cause of action, there would be no jurisdiction to grant the writ, but a mere technical defect in the pleading, which, unless remedied, might be fatal upon the final trial, would not deprive the court of jurisdiction of the action. If the substance of the petition was such that the district court could have jurisdiction of the action and to grant an injunction thereon, although the order of the county judge might be irregular and erroneous, still it could not be said that he was without jurisdiction to determine whether the petition stated a cause of action, and whether the plaintiff was entitled to the writ, and, having determined those matters, whether correctly or incorrectly, the plaintiff would be entitled to a final hearing thereon, and for that purpose to supersede the order of the district judge in setting aside the order granting the writ. It is not necessary to set out in this opinion the allegations of the petition, as they clearly show that the plaintiff's cause of action was within the jurisdiction of the district court, in which an injunction might be an appropriate remedy. The contention, then, that the order of the county judge was void because of defects in the petition cannot be sustained.

3. The order of the county judge was conditional that notice be given the defendants and undertaking entered into as required by law. It is objected that the order was void because notice was not given as contemplated

therein. No question is raised as to the form and sufficiency of the undertaking. The summons was indorsed: "Injunction allowed." The statute provides that this shall be sufficient notice of the granting of an injunction. When the summons served is so indorsed the defendant must take notice of the terms of the order, as well as of the allegations of the petition.

4. The statute quoted provides that an injunction may be granted "by the supreme court or any judge thereof, the district court or any judge thereof, or in the absence from the county of said judges, by the probate judge thereof." In this case the affidavit stated that the judge of the district court was absent, but did not mention the judges of the supreme court. It is, of course, apparent that no order of injunction can be allowed until an affidavit has been filed in substantial compliance with the statute. We are required, then, to consider whether it must in all cases be shown by the affidavit that none of the judges of the supreme court is present in the county where the order is made. The section containing this provision is in the revised statutes of 1866, which was approved on the 9th day of March, 1866. Another section of the same act, which is still in force, provides: "If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may, in the meantime, restrain such party." Code, sec. 253. The constitution gives the supreme court original jurisdiction in certain specified matters. It would seem from the various provisions of the statute that in an action to be brought in this court within its original jurisdiction, in which an injunction would be a proper remedy, the county judge might, in the absence of all of the judges of this court and the judges of the district court from the county, allow a temporary injunction. In such case the county judge could not act unless all of the judges of this court were absent from

the county. The statute in question would have direct application to a matter of that kind. The judges of this court have declined to allow injunctions in actions pending in the district courts of the various counties in the state, and their jurisdiction to allow such injunctions may well be doubted under the provisions of the constitution. The question was stated, but not determined, by this court in *Calvert v. State*, 34 Neb. 616, and Judge MAXWELL, who wrote the opinion in that case, has suggested an approved form of affidavit upon which to apply for an injunction in the district court, and in which no reference is made to the judges of this court. Maxwell, *Pleading and Practice* (6th ed.) p. 655. It appears to have been for many years accepted as the proper construction of the statute under our constitution that the affidavit for injunction, in actions pending or to be brought in the district court, is not defective so as to deprive the court of jurisdiction, because of failure to allege that the judges of this court were absent from the county in which the application was made. The order allowing the temporary injunction must be reviewed upon the final trial of the case, and may then be dissolved by the district court as improvidently issued. It seems unreasonable to suppose that it was intended that orders made in an action by a judge or judges of this court should in the same action be reviewed and set aside by the district court. This would be the necessary result, however, if the judges of this court should allow orders of injunction in actions pending in the lower courts. The objection to the affidavit in this case is purely technical. There was no attempt to show, nor was there any suggestion, that any of the judges of this court were in Kearney county when this application was made. The application for injunction contained allegations showing that the plaintiff was "entitled thereto." We should avoid, if possible, a construction of the law that might defeat meritorious causes of action upon objections so technical. We conclude that the county court was not without jurisdic-

tion because of the absence of this allegation in the affidavit for the order.

5. There was no prayer in the petition for a temporary order of injunction. The prayer was that the defendants (naming them) "be forever enjoined * * * and that upon final hearing of this case said injunction be made perpetual and for such other and further relief as may seem just and equitable in the premises." The county judge had no jurisdiction to grant a perpetual injunction. The power given to him was to grant a temporary injunction that should be enforced until the matter could be finally heard upon its merits, and, if he thought necessary, he might require notice of the application for the temporary injunction to be given the defendant before granting the same, and in the meantime might restrain the acts complained of until such application should be heard. This last-named order restraining the defendants in the meantime has been by the courts denominated as a temporary restraining order, as distinguished from a temporary injunction. There is a conflict in the authorities as to whether a temporary injunction may be awarded in an action for perpetual injunction and without any prayer for temporary relief. It may also be said that the courts are not unanimous as to whether a prayer for general equitable relief will without amendment support an order granting a temporary injunction, but the courts quite generally hold that, if facts stated in the petition will justify the granting of a temporary injunction, the prayer of the petition which fails to ask for such relief may be amended when objection is first made upon that ground, and a temporary injunction be allowed. If the order allowing the temporary injunction is made, the objection that the petition, which states facts justifying such order, does not ask for such relief is purely technical, and, under our liberal provisions for amendment of pleadings and proceedings, such amendment ought to be allowed for the purpose of supporting that order whenever it is assailed. We think, therefore, that this technical

favor it is granted the right to continue it in force until the final determination of the cause. The courts cannot change these statutes. The great delay and embarrassment sometimes caused by improvident injunction orders are serious matters. No such orders should be made without careful investigation and consideration, and only when it is reasonably clear that the order is necessary and will prevent wrongs and injury otherwise unavoidable without itself causing greater injuries. It is seldom, if ever, necessary that a county judge should allow an injunction as distinguished from a temporary restraining order. The legislature has given that officer the power to do so, and when he acts within the authority given him by statute his orders have the same force as similar orders of the court having complete jurisdiction of the action.

After the alternative writ was issued, the defendant filed an answer to the original petition which was in the nature of a demurrer on the ground that the application for the writ itself shows that the county judge was without jurisdiction to issue the writ, and that because of irregularities the writ is void. By agreement the cause was submitted as upon the defendant's objection to the original application in this court for the allowance of the writ of mandamus, and has been so considered by this court. These objections are not well taken, but it will not be presumed that a peremptory writ will be necessary, and none will be issued except upon application and showing of the necessity thereof.

The defendant's objections to the application for the writ are overruled; each party to pay his own costs.

OBJECTIONS OVERRULED.

REESE, C. J., and BARNES, J., absent and not sitting.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1911.

L. A. WILSON, APPELLEE, V. ANNA J. WILSON, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,422.

1. **Divorce: DISMISSAL OF SUIT.** "Upon an application for a divorce, where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill." *Nagel v. Nagel*, 12 Mo. 53.
2. **Attorney and Client: MISCONDUCT OF ATTORNEY.** Where the wife is charged with the crime of adultery with her attorney, who is made corespondent in an action for a divorce, it is against the ethics of the legal profession for such corespondent to act as both attorney and witness for the wife. His testimony being necessary in the denial of the adultery, he should not appear in the case as counsel.

APPEAL from the district court for Gosper county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

W. G. Hastings and R. D. Stearns, for appellant.

O. E. Bozarth, W. S. Morlan and Ritchie & Wolff,
contra.

REESE, C. J.

This is an action by plaintiff and against defendant for a divorce on the ground of adultery. Upon a trial to the district court, the issues were found in favor of plaintiff and the divorce granted. Defendant appeals.

It is alleged in the petition that the parties were married on the 21st day of October, 1904, and that since that time plaintiff has "conducted himself toward the defendant as a kind, loving and providing husband." It is further alleged that defendant, regardless of her marital duties and obligations, on the 12th day of December, 1908, at Holdrege, Nebraska, committed adultery with one Lafe Burnett, and plaintiff has not cohabited with defendant since the discovery of such offense; that there were no children born to said marriage; that defendant had been twice married before her marriage to plaintiff; that plaintiff had not been theretofore married; that defendant is the owner of personal property to the amount of about \$2,500. The prayer is for divorce and the recovery of costs. What is evidently an amended answer and cross-petition was filed by defendant, in which is admitted that defendant is the owner of personal property, but of much more value than the amount alleged in the petition; that said property is held by plaintiff, and defendant is without means with which to conduct her defense. The averment in the petition that plaintiff had conducted himself toward defendant as a kind, loving and providing husband is denied, and it is alleged that plaintiff has been guilty of extreme cruelty toward defendant by personal violence, and by fraudulently confining her in a hospital for the insane in Council Bluffs, Iowa, as well as fraudulently causing her to be imprisoned in the hospital for the insane in this state, without care, attention, concern, or inquiry on his part, from the 27th day of March, 1905, until the month of November, 1908, where she was wholly neglected by him, and after her discharge from said hospital failed and refused to contribute anything toward her support or maintenance, notwithstanding he had a large amount of her property in his possession, he well knowing of her destitute condition; that after her said discharge he had threatened to have her re-examined on a charge of insanity, and again incarcerated in said hospital. The charge of adultery is denied.

By way of cross-petition a divorce from plaintiff is demanded on the ground of extreme cruelty, and it is alleged, in substance, that at the time of the marriage, and thereafter, defendant was the owner of a large amount of property, consisting of real estate and personal property, and for the purpose of depriving defendant thereof and securing it to his own use, ownership and possession, and contriving to defraud her out of the same, he caused her to be confined in a hospital for the insane, took possession of her property, caused and procured himself to be appointed as her guardian, thereby obtaining the custody and control of her property, caused and procured a mortgage for a small amount on her real estate to be foreclosed and the land purchased for him by another, who afterward conveyed the land to him, thereby contriving and intending to defraud her of the whole thereof, and abandoned defendant, leaving her practically penniless. Descriptions of the property, real and personal, are set out in the answer and cross-petition, but for the purposes of this decision they will not be noticed here. It is alleged that she is wholly guiltless of the crime of adultery, but that the charge has been made against her in furtherance of the cruelty and designs of plaintiff.

By the reply the averments of the answer and cross-petition, not specifically admitted, are denied. The charge of adultery is reaffirmed. Her insanity is alleged as the reason for her confinement. It is averred that the real estate referred to was the property of William A. Scales, a former deceased husband of defendant, and upon his death the fee thereof descended to his child, Gladys Scales, as his sole heir. The payment to defendant of certain sums of money as temporary alimony and otherwise is alleged; prayer that the cross-petition of defendant be dismissed, and that a decree of divorce be granted as prayed in the petition. The result of the trial was as above indicated.

A number of questions are presented for decision; but, as the decision of one will control the disposition of the

case, we will consider that one alone. The trial court, believing and acting upon the theory that the cruelty alleged in the answer, and of which proof was offered, could not constitute any defense to a charge of adultery, excluded, in the main, all evidence offered in support of the cross-petition. Many objections by plaintiff to depositions and oral testimony offered by defendant were based upon the ground that "neither abandonment nor extreme cruelty is a sufficient recriminatory defense to a charge of adultery in a divorce proceeding," and which objections were sustained by the court over the exceptions of defendant. The whole record shows conclusively that this was the view of the court, and some authorities may be found supporting the doctrine, in the abstract, that cruelty may not constitute a defense; but, when considered in the light of the averments of the answer and cross-petition and evidence tendered, we doubt if a well-considered case, decided since the abandonment of the jurisdiction of the ecclesiastical courts of England over the subject of divorce, can be found sustaining the holdings of the district court in this case. We do not deem it necessary to examine or discuss the history or development of this phase of the law, but shall be content with the citation of the more modern decisions upon the subject in connection with a glance at what we conceive to be the reason for, and justice of, these more modern holdings. In the beginning, it should be noted that, if the averments of the answer and the offers of proof upon the trial are true, the case is one of extreme cruelty. Those charges may be untrue, but we have no means of knowing all the facts until the subject is fully and impartially investigated. If they are untrue, nothing could be plainer than it would be the duty of plaintiff to himself and his own reputation to throw open the door of inquiry and allow their falsity to be shown and his good name vindicated. Such seems not to have been the course pursued by him and his counsel. If they are true, he has no possible right to a divorce based upon the fact of branding

his much abused, defrauded and neglected wife as an adulteress.

Defendant was a widow living upon and managing a farm of practically half a section of land, well stocked with live stock and farm implements, holding, as we are justified in inferring, at least a life interest in the real estate, and apparently in a prosperous condition. Plaintiff married her, moved on and occupied the farm and property. If the averments and proffered evidence are true, within from two to three months after their marriage defendant was taken violently sick while at a meal at the table, and was soon thereafter sent to a hospital at Council Bluffs, and confined in an insane ward, where she remained eleven weeks. She returned to her home one day, was not invited to remain, and went to a neighbor's, where she was entertained for two or three days. Then a charge of insanity was preferred against her, and she was sent to the hospital for the insane at Lincoln, where she was confined and held, with more or less freedom, from the month of March, 1905, until November, 1908, during which time no attention or regard was paid to her by plaintiff. When we consider the testimony of Dr. Hay, who was either an assistant physician or superintendent of the hospital during the time of her confinement, and other physicians in charge, as well as those with whom defendant associated, which is preserved in the bill of exceptions (though much of it was rejected by the trial court), we are led to entertain serious doubts as to her insanity. After her discharge no attention was given her by plaintiff, except that at one time he furnished her \$10, which he charged up against her estate, the property of which was then in his possession. She was thus thrown upon her own resources after her discharge from the hospital, and was compelled to earn her own living. Within four months after defendant's incarceration, plaintiff applied to the county court for letters of guardianship of the person and property of defendant, alleging her to be incompetent, and his appointment was

accordingly made, when he received and maintained charge of her personal property of the appraised value of \$1,528.90. There was a mortgage of some \$900 upon defendant's land, but by failure to pay either the principal or interest thereof it was allowed to go to foreclosure and sale, notwithstanding his apparent ability to pay the same out of defendant's property. At the time of the decree and sale of the land under the foreclosure proceedings, plaintiff was the guardian of defendant and her property, but he allowed the land to be sold to the wife of the attorney for plaintiff in the foreclosure suit. The decree of foreclosure was entered on the 6th day of September, 1905. We are unable to find the date of the issuance of the order of sale, but the sale occurred on the 6th day of November, 1905, showing that no stay was taken, and, to that extent at least, that no effort was made by him to protect the rights of defendant. The deed was made to the purchaser at sheriff's sale on the 5th day of February, 1906, and is signed by plaintiff as sheriff of Gosper county. On the next day (February 6, 1906) the purchaser at the sheriff's sale (her husband joining in the deed) conveyed the land to plaintiff, who, so far as is shown by this record, is now in the peaceable possession of the half section of real estate, and his wife is deprived of its enjoyment, its income and the provision it affords for her declining years. In addition to this, the allegation is made that, while plaintiff was making his home with defendant as her husband, he assaulted her and otherwise mistreated her personally. As we have said, we have no means of knowing as to the exact truth of the allegations and offers of proof, for the reason that much of the offered evidence was excluded. We find the records of the decree of foreclosure and deeds in the bill of exceptions.

If the allegations and offered proof are true, is plaintiff entitled to a decree, even if the adultery of defendant be conceded? Our answer is, most certainly not. By section 7, ch. 25, Comp. St. 1909, extreme cruelty, whether practiced by using personal violence, or by any other

means, utter desertion for the term of two years, or when the husband, being of sufficient ability to provide suitable maintenance for his wife, shall grossly or wantonly, and cruelly refuse or neglect so to do, are made distinct and separate grounds for divorce, either from the bonds of matrimony, or from bed and board. If the averments of the answer and cross-petition and offered evidence are true, any one of the causes provided by statute would have given defendant a divorce long before any charge of adultery was preferred against her.

In 14 Cyc. 650, it is said in the text: "By the weight of authority, the offense pleaded in recrimination need not be of the same nature as the offense which defendant has committed. Any misconduct on the part of complainant which constitutes ground for divorce bars his suit, without reference to the nature of the offense of which he complains, although in some states a contrary rule prevails by statute or otherwise and the two offenses must be of the same character. Accordingly in most jurisdictions adultery may be set up in recrimination to a suit based on defendant's cruelty, defendant's desertion, or defendant's commission of an infamous crime. So cruel conduct, if made a ground of absolute divorce, may be shown in recrimination of a charge of adultery. And desertion will bar a suit based either upon an act of adultery subsequently committed by defendant, or upon defendant's cruelty"—citing many cases sustaining the different propositions suggested by the paragraph. As bearing upon the sentence that "cruel conduct, if made a ground of absolute divorce, may be shown in recrimination of a charge of adultery," the author cites *Nagel v. Nagel*, 12 Mo. 53, *Reading v. Reading* (N. J. Ch. 1886) 5 Atl. 721, *Church v. Church*, 16 R. I. 667, and *Pease v. Pease*, 72 Wis. 136, which we have examined, and they are found to fully sustain the text. In 2 Bishop, Marriage and Divorce (6th ed.) sec. 84, the question is propounded: "Where the divorce is from bed and board, as it was formerly in England for adultery and cruelty, respect-

Wilson v. Wilson.

ively, is the former English rule whereby cruelty is not a bar to the adultery suit to be followed?" The answer is: "No. The correct rule is that, where each of the married parties has committed a matrimonial offense which the law has made ground for divorce in favor of the other, so that when one asks for this remedy the other is equally entitled to the same, whether the offenses are the same or not, the court can grant the prayer of neither," etc. In section 90 the question is asked: "Will ill conduct for which the law has provided only the limited divorce bar a suit to dissolve the marriage?" The answer is: "Yes." And the reason for the rule is given by the author. Again, in section 93, the question is asked: "In any suit for dissolution, will any conduct for which the law provides the same consequence be adequate in bar, whether otherwise of the same sort or not?" The answer is: "Yes. And the reasons given in the solution of the first and second questions (heretofore quoted) show equally, and still more forcibly, this to be so also." The reasons for this rule are also given by the author with cases cited in their support. The same subject is discussed in 2 Bishop, Marriage, Divorce and Separation, ch. 11, and with the same conclusion. In section 340 it is said: "Recrimination in divorce law is the defense that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony. It bars the suit founded on whatever cause, whether the defendant is guilty or not." In summing up the whole matter it is said in section 365: "It is a bar to any suit to dissolve a valid marriage, or to separate the parties from bed and board, that either before or after the complained-of *delictum* transpired, the plaintiff himself did what, whether of the like offending or any other, was cause for a divorce of either sort." The subject is discussed in 9 Am. & Eng. Ency. Law (2d ed.) 816 *et seq.*, and the same rule is drawn from the authorities cited. At page 818 it is said: "The doctrine of recrimination is applicable to all the causes for divorce. The legislatures having

Wilson v. Wilson.

provided the same legal effect for each cause for divorce, the courts refuse to measure the gravity of the several causes, but hold each effectual as a bar in recrimination." It is not deemed necessary to pursue this subject further. The doctrine here stated is the acknowledged rule in nearly, if not quite, all the states of the Union.

Much is said and many cases are cited in the "Rejoinder Brief of Appellee" upon the subject of the attitude of one of the counsel for defendant, in that he is the corespondent, an important witness for defendant, and assumes principal charge of the cause of defendant on trial. We fully agree with the criticism of plaintiff's attorney. While the law does not prohibit it, the course pursued is against the ethics of the legal profession, is unseemly, and no doubt weakens defendant's case. The position should be abandoned at once, and the cause placed in the hands of proper counsel, and the one charged as corespondent withdrawn from the case. If such course be pursued, we would no doubt be provided with a better record should this case appear again before us.

The decree of the district court is reversed, and the cause is remanded, with directions to retry the case upon the issues presented, and if both parties be found guilty of such conduct as, under the statute, would entitle each to a divorce, that the petition and cross-petition be each dismissed.

REVERSED.

Root, J.

I concur in that part of the majority opinion holding that the plaintiff should not be divorced if he has been guilty of conduct which in itself entitles the defendant to a divorce, but I dissent from that part of the opinion which questions the sufficiency of the evidence to sustain a finding that the defendant was guilty of adultery, and dissent from the part of the judgment directing a retrial of that issue.

There is not sufficient proof in the record to sustain

any of the defendant's allegations of cruel treatment. Possibly, if the evidence excluded by the district court had been received, the result would have been otherwise. The defendant did not file a motion for a new trial, nor assign as error the exclusion of that evidence, but has appealed to this court upon the evidence received.

Applying the ordinary rules of practice to this case, it should be determined upon the record presented by the appellant; but, since there may be some reason to believe that she would have made proof of facts sufficient to defeat the plaintiff's cause of action, I concur with the majority of the court in saying she should be given that opportunity. Nothing, however, can be gained by a retrial of the charge of adultery. The evidence is convincing on that score. It was sufficient to convince beyond all reasonable doubt the two juries which tried the defendant's paramour, and his conviction was affirmed by this court. The proof is satisfactory that the defendant and her paramour were registered at a Holdrege hotel under fictitious names as husband and wife; that in the defendant's presence her companion stated to the hotel clerk, "We might just as well get a room and go to bed right;" that about two hours thereafter the officers of the law gained access to this room and discovered the respondent engaged in putting on his trousers, while the defendant was in bed attired solely in a *robe de nuit* and an abbreviated undergarment. The bed gave every evidence of having been occupied by two persons, and the defendant defiantly stated to the officers that they would have done as her companion had if given the opportunity. The defendant's paramour exclaimed at the time that nothing would save him from the penitentiary.

There is also other evidence in the record tending strongly to convince the impartial mind that the defendant had broken her marital vows. The defendant does not say that she can produce any other competent evidence to sustain her denial, and to the writer it seems an uncalled for waste of time to retry the issue.

Clark Implement Co. v. Jay.

The cause should be reversed, with directions to hear evidence upon the defendant's charges of extreme cruelty, and, if found true, the petition and the cross-petition should be dismissed, otherwise a decree of divorce should be rendered in the plaintiff's favor.

CLARK IMPLEMENT COMPANY, APPELLANT, v. CLIFTON JAY
ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,506.

1. **Appeal: CONFLICTING EVIDENCE.** In a jury trial, all questions of fact depending upon conflicting evidence are for the decision of the trial jury, and, unless manifestly wrong, the verdict cannot be set aside.
2. ———: **REVIEW.** In the instant case there is no controlling question of law involved, no objection being made to the instructions given the jury by the trial court. The evidence is examined, but not set out in the opinion, and no reversible error is found.

APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

H. N. Marshall and H. H. Mauck, for appellant.

*R. D. Sutherland, S. W. Christy and L. E. Cottle,
contra.*

REESE, C. J.

This action is founded upon a promissory note for \$390 executed by the defendant Clifton Jay, as principal, and S. J. Boomer, as surety. The petition is in the usual form. The answer admits the execution of the note, but alleges as a defense thereto that it was given as a part of the purchase price of a threshing machine or traction engine which it is alleged plaintiff sold to defendant Jay, the price of which was \$780, evidenced by

Clark Implement Co. v. Jay.

two promissory notes of \$390 each, and, in addition thereto, one second-hand engine of the "Kitten" Manufacturing Company's make; that the contract of sale and purchase was made in writing, and provided for the sale and delivery of "one 16-horse compound engine No. 9,581, rebuilt job, Council Bluffs, Iowa, and in good running order when shipped;" that, in consideration of the warranty and agreement and delivery of the engine, the defendant executed the two notes and delivered to plaintiff the said second-hand "Kitten" engine of the value of \$225. The substance of further averments of the answer is that the engine was, to the knowledge of plaintiff, purchased for the purpose of operating a threshing machine separator of a certain size, then owned by Jay, and that he attempted to use the engine in furnishing power for the propelling of his said separator, but that upon the test by defendant, who was accustomed to handle steam engines, the engine in question was found to be inadequate—was not of 16-horse power, nor in good running order when shipped, nor at any time thereafter, and was a failure in every respect; that, upon notice to plaintiff of the failure of the engine to meet the required conditions, plaintiff sent experts to place the engine in order, but that it could not be made to perform, nor was it in the condition warranted, and was finally returned to plaintiff; that the consideration for the notes and engine furnished plaintiff had failed, or, rather, was never received. The prayer is for the dismissal of the action, and for an affirmative judgment in favor of Jay for \$225, the value of the engine furnished plaintiff. The reply is quite lengthy, but is, in effect, a denial of all defensive matter set up in the answer. There was a jury trial, which resulted in a verdict in favor of defendant and an assessment of "the recovery of the defendant Jay at the sum of \$225, and cancelation of note." A motion for a new trial was filed, overruled, and a judgment rendered against plaintiff and in favor of defendant for the said sum of \$225, and the costs of suit. Plaintiff appeals.

There is no controversy as to the value of the "Kitten" engine furnished plaintiff by defendant, it having been agreed upon the trial that its value was \$225. There is no contention by plaintiff that there is error in the instructions of the trial court to the jury. The errors assigned here are that the verdict is not sustained by sufficient evidence and is contrary to law, errors of law occurring during the trial, and the court erred in overruling plaintiff's motion for a new trial. We have read the bill of exceptions throughout, and have considered all the evidence with care. In the introduction of evidence on the part of defendant, the court held the investigation of the facts well within the issues presented by the pleadings, and we are unable to see where plaintiff has any just ground to complain as to the rulings of the court upon the questions raised during the trial.

The principal contention by plaintiff is that the verdict is not sustained by sufficient evidence. We cannot see that it would serve any good purpose to review the evidence in detail, nor even to set out its substance. There is no doubt but that, had the verdict been the other way, it would have been sustained, for under the conflicting character of the evidence there was sufficient to support a verdict either way. The jury, however, being the sole judges of the weight of the evidence, and every fact having been fairly submitted to them, we are unable to say that the verdict is so clearly wrong as to require a reversal of the judgment. One of the contentions of plaintiff is that of the alleged incompetence of defendant Jay, who had charge of the engine during the time of his effort to use it, as a traction engineer. The evidence shows that he had had experience with steam engines, and his examination as a witness showed quite a degree of experience with steam as an engineer. If we should assume that the testimony of plaintiff's witnesses as to the condition of the engine when delivered to defendant and its condition when inspected by them after his efforts to use it was all true, we could probably say that the verdict should not

Clarence v. State.

stand, but of this the jury were the sole judges. They have given credence to defendant and his witnesses, both as to his competency as an engineer and the condition and alleged uniform failure of the engine to render the service required of it, and we must be content with their finding. All questions presented by plaintiff have been examined, but we find no legal grounds for interfering with or setting aside what has been done.

The judgment of the district court will therefore be affirmed, which is done.

AFFIRMED.

JOHN CLARENCE V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1911. No. 16,985.

1. **Criminal Law: CHANGE OF VENUE.** "A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and, unless there has been an abuse thereof, its ruling on the motion cannot be disturbed." *Sweet v. State*, 75 Neb. 263.
2. ———: **ADMISSION OF EVIDENCE: HARMLESS ERROR.** The erroneous admission of evidence offered by the state in a criminal prosecution which can have no prejudicial effect upon the rights of the defendant will not, as a general rule, require the reversal of a judgment of conviction.
3. ———: **HOMICIDE: TRIAL.** The information charged the commission of the crime of murder in the first degree. Upon a trial of the accused he was convicted of murder in the second degree. The cause was removed to the supreme court by proceedings in error for review. The judgment of conviction was reversed and the case remanded for further proceedings. At the commencement of the second trial the defendant moved the court to require the county attorney to put him upon trial for manslaughter only, as he had been acquitted of murder in the first degree upon the former trial, and the supreme court had reversed the judgment of conviction of murder in the second degree. The motion was overruled. *Held*, No error, as the reversal of the judgment placed the accused in the same position he was prior to the former trial.
4. **Instructions, given and refused, examined, and no error found.**

Clarence v. State.

5. **Homicide: EVIDENCE: SENTENCE.** The evidence submitted upon the trial is examined and found sufficient to sustain a verdict for manslaughter, but of a low grade, and the sentence is reduced from ten to two years in the penitentiary.

ERROR to the district court for Cass county: **HARVEY D. TRAVIS, JUDGE.** *Affirmed. Sentence reduced.*

William Deles Dernier and John C. Watson, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

REESE, C. J.

Plaintiff in error was prosecuted in the district court for Cass county for the murder of John P. Thacker. Upon the first trial he was found guilty of murder in the second degree. The cause was removed to this court by proceedings in error, when the judgment was reversed and the cause remanded for further proceedings. The case is reported in 86 Neb. 210. Upon a second trial the accused was found guilty of manslaughter and sentenced to ten years in the penitentiary. He again brings error to this court.

The facts disclosed upon the second trial are substantially the same as upon the first, and the statement thereof as contained in our former opinion will, to a considerable extent, relieve us from its repetition here. Such of the assignments of error, now presented, as seem to merit consideration will be taken up substantially in their order.

Before entering upon the trial, plaintiff in error (whom we will hereafter designate as the defendant) filed his motion for a change of venue from Cass county on the ground of the bias and prejudice of the people of said county. In support of this motion he filed between 30 and 40 affidavits from citizens of the county as well as his own and those of his attorneys, which tended to sustain

his claim of the existence of such bias and prejudice. The state filed between 70 and 80 counter-affidavits, which, to a considerable extent, contradicted those filed by defendant, and tended to show that little was said or thought about the case, and that there was no such bias and prejudice as would prevent him from having a fair and impartial trial. The motion for the change of venue was overruled, and the ruling is assigned for error here. The alleged crime was committed on the 15th day of January, 1909. The motion and affidavits were filed in October, 1910. The length of time-intervening between the alleged killing and the second trial seems to have been sufficient to have decreased, if not entirely removed, whatever of feeling may have existed immediately after the homicide, and this fact, no doubt, was taken into consideration by the court in connection with the statements contained in the affidavits. Applications for change of venue are directed to the sound discretion of the court to which they are made, and the ruling of the court thereon will not be reversed, except in case of the abuse of that discretion. *Sweet v. State*, 75 Neb. 263. We can detect no reversible error in the ruling of the court upon that motion.

During the introduction of evidence in chief by the state, the prosecution was permitted to prove, over the objection of defendant, that for a long time before the killing of Thacker he (defendant) was in the habit of carrying a revolver, and that in some instances it was strapped or belted to his body under his coat and thus concealed. This evidence tended strongly to show that defendant had for many years, almost constantly, carried a revolver, but that fact was not concealed by him and was known by practically all with whom he was acquainted. We can see no good reason why the prosecution insisted upon making this proof, as it was a fact freely admitted by defendant, and his crippled condition and the business he was engaged in were assigned as a justification for carrying arms. The evidence could have but one logical effect, which was to show, beyond question,

that the possession of the pistol at the time of the homicide was not the result of a special preparation for the particular occasion with the purpose of taking the life of decedent. Stronger evidence of the lack of preparation and premeditation could scarcely have been produced. While the admission of this testimony was erroneous, yet it could work no prejudice to defendant and was decidedly in his favor, and he cannot be heard to complain upon that account. The contention that, technically, the purpose of the evidence may have been to prove the commission of an offense under the provisions of section 25 of the criminal code can have no bearing upon this case, since it was abundantly shown by the state's witnesses that he did not conceal his pistol, and therefore no offense was committed, and the law, as it then stood, was not violated. Even had he concealed the weapon, his well-known crippled condition would probably have furnished his justification under the statute.

An unusual and seemingly unnecessary number of photographs were introduced in evidence, some of which were offered by defendant. We have failed to find any objection or exception to those offered by the state. The bill of exceptions is a large one, and there is no mention in the briefs of the pages thereof where such exception can be found, as required by the rules of this court. We have searched the record and find none.

At the commencement of the trial defendant moved the court for an order requiring "the county attorney to put defendant on trial for manslaughter only." The reasons assigned have reference to the former trial—that defendant had been acquitted of murder in the first degree; that the judgment of conviction of murder in the second degree had been reversed by the supreme court; that no new or other witnesses had been indorsed upon the information, and the same state of facts as at the former trial would be presented, and that the supreme court had reviewed the evidence produced upon the former trial, etc. This motion was overruled, and the ruling is now assigned for

Clarence v. State.

error. It is clear that the court did not err in overruling the motion. The information charged the crime of murder in the first degree. The reversal of the judgment of guilty of murder in the second degree and the remanding of the case for another trial placed defendant in the same position with reference to the information and the issues thereunder that he would have been had no former trial been had, and the whole case was open for investigation. *Bohanan v. State*, 18 Neb. 57. Had the evidence been sufficient to sustain a verdict finding defendant guilty of murder in either degree, and the verdict found him guilty thereof, there is no legal reason why sentence might not have been imposed accordingly.

A number of instructions to the jury were asked which the court refused to give, and it is contended that in this action the court erred. An examination of these instructions in comparison with those given by the court upon its own motion shows that the substance of all, which should have been given, was given, and some of them in practically the language requested. With two exceptions they related to the law of self-defense, which was sufficiently given in the court's instructions. The eighth instruction asked and refused was to the effect that the jury might find defendant guilty of assault and battery, if they believed the evidence so warranted. This was properly refused, as there was no evidence which could require the instruction to be given. The eleventh instruction asked and refused was to the effect that words spoken could not justify an assault. This was given by the court in the twenty-fourth instruction. We find no reversible error in the matter of instructions.

The most serious and perplexing question presented is in the contention that the verdict of guilty of manslaughter is not supported by sufficient evidence. Had it not been for the crippled and almost helpless condition of defendant at the time of the tragedy, we would have no hesitation in affirming the judgment to the full extent of the sentence imposed. But in the consideration of the

case this subject is one which is entitled to weight. Defendant took the witness-stand in his own behalf. On the part of the state Lee Thacker, son of decedent, was produced and examined. The two did not vary in their version of the affair to any great extent, and, from the reading of their testimony, we are impressed with their apparent candor and truthfulness. In some particulars they differed, but to no greater extent than would naturally be expected when we consider the length of time they were on the stand and the care and searching character of the examination and cross-examination of each. On the morning of the tragedy, a brother of decedent accosted defendant and informed him that decedent had expressed himself as desiring an opportunity to assault and "beat up" defendant. So far as the evidence shows, this was the first intimation defendant had that decedent entertained any animosity toward him, if any such existed. Their personal relations had been friendly, so far as appeared. It is true that a witness testified that on a previous occasion defendant made use of language which would indicate that, had he received treatment from decedent similar to that imposed upon another, he would have effectually resented it, but this was denied by defendant. However, were the statement made at the time testified to, it was so long prior to the time of the killing as to have but little weight in considering defendant's purpose on that occasion. On the next day after the tragedy, and at the time when decedent had little, if any, hope of recovery, he made a statement of his version of the affair, which was to the effect that, when he advised Carter Albin to slap the young man with whom he was quarreling, defendant said to decedent, "Keep your damn nose out of that business or I'll shoot hell out of you;" that he, decedent, then started around the head of the horses (evidently going toward defendant), and, when some 12 to 14 feet from defendant, defendant shot him in the leg; that decedent then picked up a stick and struck defendant over the head, then seized the cane which de-

fendant had and struck him with it, when defendant shot decedent two other times; that decedent thought he had struck defendant "hard enough to knock an ox down, but he had to knock him down with his fist;" that he thought it was no use to try to run away, for defendant would "shoot him to pieces," so he thought he would try to get the gun away from him; that another person, named, had shot at him once before, and he thought the gun defendant had was the little one the other person had and he knew he could "eat" that one, but knew it was not when defendant commenced to shoot. This statement is written in the third person, and was not skillfully drawn. It was not signed by decedent, but by the bystanders, or those who had heard him state his version of the difficulty. There is a conflict in the evidence as to the exact language used by defendant at the time decedent advised the assault upon one of the persons in the quarrel. It appears that no word was spoken by either decedent or defendant after defendant ordered decedent not to interfere in the quarrel between the other two, nothing having been said by decedent to defendant during the whole time. There was sufficient evidence, whether true or not, to sustain the finding of the jury that defendant ordered decedent to keep his mouth out of the quarrel between the other two, or he would shoot him; that thereupon decedent started toward defendant, and, when 12 to 14 feet from him, he stooped down to pick up a stick or board; that at that moment of time defendant shot at decedent, striking him in the leg, the ball passing through the flesh above the knee, but not fracturing the bone; that decedent then closed in on defendant and struck him on the head with the stick or board, when defendant raised his cane, either for offensive or defensive purpose, which decedent took from him and struck him one or more violent blows upon the head; that the cane was then dropped. In the statement made by decedent, he is represented as saying that he knocked defendant down with his fist. This is not sustained by any other testimony,

but defendant testified that after receiving the blows he could not say in detail what did occur. It is clear that about that time, in fact at the moment, decedent caught defendant around his body, standing to his left side and somewhat in the rear, when another shot was fired taking effect in the lower part of the body of decedent, when both fell to the ground, decedent upon defendant, and that while falling or immediately after striking the ground the fatal shot was fired, the ball passing downward through the stomach of decedent. The parties were separated, when decedent was taken to his home in a carriage, and defendant procured his horse, rode to Plattsmouth, inquired for and found an officer and surrendered to his custody. There was no quarrel between defendant and decedent, the only remark having been made by defendant when ordering decedent to keep out of the controversy between the other two. The jury probably found that in that order there was a threat to shoot decedent in case he interfered further. If the jury found that at the time of the firing of the first shot there was no sufficient reason or ground for defendant to fear an assault by decedent, of such a character as to endanger his life or inflict great bodily harm, their conclusion might be that he invited and induced the attack, and for that reason he could not plead self-defense to the extent of justifying his acquittal, and therefore he was guilty of manslaughter. This view of the case would justify the verdict, but, probably, by quite a narrow margin. From a careful consideration of the evidence, we do not see our way clear to hold, as matter of law, that the verdict is unsupported by the evidence. However, we all agree that the sentence imposed by the court was excessive under the peculiar circumstances as shown by all the evidence. When we consider the size, strength and disposition of decedent, his apparent willingness to engage in the contest, his severe and violent assault upon defendant after the firing of the first shot, and the almost helplessness of defendant in his hands, we are constrained to say that, while we are un-

Forsha v. Nebraska Moline Plow Co.

able to set aside the verdict, we do not hesitate to very materially reduce the sentence.

The sentence will therefore be modified to the extent of reducing it to two years' confinement in the penitentiary at hard labor, but without solitary confinement, and the payment of the costs of prosecution, and, as thus modified, the judgment is

AFFIRMED.

**NATHAN RAY FORSHA, APPELLEE, v. NEBRASKA MOLINE
PLOW COMPANY, APPELLANT.**

FILED SEPTEMBER 25, 1911. No. 16,411.

1. **Master and Servant: EXISTENCE OF RELATION.** "A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work so that the relation of master and servant arises between them, even though the general employer may have an interest in the special work." *Westover v. Hoover*, 88 Neb. 201.
2. **Appeal: JOINT TORT-FEASORS: INCONSISTENT VERDICT.** Where two persons are sued jointly for damages caused by the alleged negligence of a third person, and the evidence shows that such third person was the general agent of one of the defendants, and at the time his negligent acts occurred was acting for and in the special business of the other defendant, a verdict against his general employer, which at the same time exonerates the defendant in whose service he was specifically or specially engaged, is so inconsistent as to require a reversal of the judgment rendered thereon.
3. **Trial: REFUSAL OF INSTRUCTIONS.** It is reversible error to refuse to give a requested instruction which is applicable to the evidence where the proposition contained therein has not been covered by any other instruction given by the court.

**APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Reversed.***

Rich, O'Neill & Gilbert, for appellant.

Stubbs & Stubbs, H. N. Marshall and H. H. Mauck,
contra.

BARNES, J.

Action by Nathan Ray Forsha, a minor, by his next friend, to recover damages for personal injury sustained by reason of the alleged negligence of the defendants. A trial in the district court for Nuckolls county resulted in a verdict against the Nebraska Moline Plow Company and in favor of Murdock & Son. From a judgment on the verdict the plow company has appealed.

It appears that the plow company is a Nebraska corporation having its principal place of business in the city of Omaha, and is a manufacturer and jobber of agricultural implements; that Murdock & Son were engaged in the hardware and implement business at Hardy, in Nuckolls county, prior to and during the year of 1906; that in August of that year the defendants Murdock & Son ordered and purchased of the defendant plow company a National Manure Spreader for the purpose of resale to their trade; the plow company being the exclusive agents or jobbers handling that machine in the territory which included the state of Nebraska. The spreader was shipped to and received by Murdock & Son, and shortly before the 13th day of October, 1906, they requested the plow company to send them an expert to exhibit and demonstrate the machine. The reason for choosing that date was a public sale of horses to be held at that time and place. The request was complied with, and an expert by the name of Bartlett, who was regularly employed by the plow company for that and other purposes, was sent to the Murdocks to make the desired demonstration. On the morning of October 13 Bartlett and the Murdocks erected upon the principal street of the village of Hardy, and adjacent to the Murdock hardware store, a temporary platform on which to place the spreader

so that its hind wheels, which were geared to run the mechanical parts of the machine, would turn without touching the ground. Murdock & Son furnished a gasoline engine as power, a belt was placed on one of the hind wheels of the spreader and the pulley of the engine, and a demonstration was conducted during the forenoon of that day. After the horse sale was concluded, the Murdocks requested further demonstration, and one of the Murdock boys took a position in the seat of the spreader to handle the lever which controlled the gears, Clyde Murdock took charge of the gasoline engine, while Bartlett proceeded to demonstrate the working part of the machine to those who were present out of curiosity or as prospective purchasers. The engine was started and the demonstration had proceeded a short time, when, as stated by the witnesses, there was a sudden crash, one of the slats which revolved around the drum at the rear end of the spreader broke, and part of it flew off and struck the plaintiff, who was standing on the sidewalk, causing the injuries complained of.

From the foregoing statement of facts, if Bartlett, the expert, was for the time being in the employ of Murdock & Son and under their directions, they would be responsible to an innocent third party for his negligence, and the plow company could not be held liable, unless it was also responsible for the negligence of Bartlett, which was the proximate cause of such injury. The evidence is that at the time of the demonstration Bartlett was in the employ and under the control of Murdock & Son, and this evidence does not seem to be contradicted. Therefore the plow company could not be held liable for Bartlett's negligence, unless it was interested in, and was actually promoting, the demonstration which was going on. However, it may be inferred from the evidence that the plow company was interested in the sales of spreaders, because that company could alone furnish them to the trade, and therefore would realize a profit on each spreader sold. In that case the plow company would be

Forsha v. Nebraska Moline Plow Co.

interested in promoting such sales. Whether that interest would be sufficient to make it liable for negligence of Bartlett it is not necessary to determine in order to make a proper disposition of this case. It appears that the trial court, by paragraph 7 of its instructions, charged the jury that if they found that the plow company was engaged in selling and other farm machinery, and employed Bartlett as its agent as an expert for the purpose of advertising and retail dealer in setting up, operating, and demonstrating said machinery for the purpose of sales thereof, and that he was engaged with the defendants Murdock in operating the machine by the authority of the plow company, and that company was liable therefor by reason of their relations in promoting the sale of the machine, then Bartlett was the representative of the company, and the company was charged with his negligence. There seems to be no evidence in the record on which such an instruction could be predicated. The defendant plow company requested the court to instruct the jury that, if Bartlett was at the time of the accident entirely under the control of the Murdocks and subject to their direction, then he was the agent of the Murdocks, and plaintiff could not have a verdict against the plow company. This instruction was refused, and the court on his own motion instructed the jury, in the closing part of paragraph 7, as follows: "But, on the other hand, if he was not so acting, but was at the time of the accident entirely out of the control of the defendant Nebraska Moline Plow Company, and entirely under the control of the defendants Murdock, then his acts were not attributable to the defendant Nebraska Moline Plow Company, and it should not be charged with responsibility by reason of anything he may have done." As we view the evidence contained in the record, it was error to give this instruction, and to refuse the one requested.

In the cross-examination of some of the plow company's witnesses an attempt was made to show, and it

is probable that it substantially appears, that Bartlett was not only generally an employee of the plow company, but was sent to Hardy and could be recalled by that company; that is, he could be taken from the service of the Murdocks if the company desired to do so; that he was not entirely out of its control, and was not entirely under the control of the Murdocks. It was not necessary, however, that he should be entirely out of the control of the plow company in order to relieve that company from liability for his negligence. It was sufficient if he was acting, in the particular work which he was doing, under the direct control of the Murdocks. If one lends an employee to the service of another person, he is, while performing that service, under the control of, and is the agent of, that other person. But it is only in the performance of that particular service that he is controlled by the person to whom he is lent, and he cannot be said to be entirely out of the control of his employer. It therefore seems clear that the instructions complained of were generally misleading, and were not a correct statement of the law.

It is further contended by the defendant plow company that the verdict in this case is in irreconcilable conflict with itself, and amounts to a declaration that the material allegations of the petition are both true and false; that two inconsistent findings of a jury upon the same issue, if based upon conflicting evidence, nullify each other, and such findings will not support a judgment. In support of this contention counsel cite *Gerner v. Yates*, 61 Neb. 100, and *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 580, where it was so held.

The evidence shows that Clyde Murdock at all times during the demonstration operated the gasoline engine which furnished the power for that purpose. It further shows that Carl Murdock, the brother of Clyde, and the younger son of Robert Murdock, sat in the seat of the spreader and operated the levers during the demonstration. It seems clear from the evidence that the negli-

Solline Flow Co.

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most seriously hurt. The Murdocks may have been guilty of negligence and thus become joint tort-feasors, but they were in no sense the masters of Bartlett. It is possible that their negligence contributed to the injury complained of, but of that the jury were the judges, and they have said such was not the case. The reversal of this judgment may deprive plaintiff of his right to recover and throw the whole burden of the loss and injury upon him, while at the same time he has a meritorious action against the plow company for his damages. The fact, if true, that the Murdocks were joint tort-feasors with the plow company does not, in law, release it from a judgment against itself alone. The plaintiff had his action against any one or all of the wrongdoers. *Hayden v. Woods*, 16 Neb. 306. They are jointly and severally liable for their wrongful acts, if any such were shown. *Scott v. Flowers*, 60 Neb. 675. The erroneous discharge of one participant in a joint wrong affords no ground of complaint to his codefendant. *Cleland v. Anderson*, 66 Neb. 252. I am unable to detect any error in the instructions. I am fully persuaded that in all that occurred Bartlett was the employee of appellant and in no sense of the Murdocks. *Harding v. St. Louis Nat. Stock Yards*, 242 Ill. 444; *Driscoll v. Towle*, 181 Mass. 416.

In any view of the case, as presented by this record, the judgment of the district court should, in my opinion, be affirmed.

FAWCETT, J., concurs in this dissent.

LIZZIE M. SMITH, ADMINISTRATRIX, APPELLEE, v. WILLIAM COON, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,518.

1. Negligence: CONFLICTING EVIDENCE: DIRECTING VERDICT. In an action to recover damages for death by wrongful act, where the

Smith v. Coon.

evidence as to the negligence of the defendant and the contributory negligence of the deceased is conflicting, it is the duty of the trial court to refuse to direct a verdict for the defendant.

2. **Highways: OPERATION OF AUTOMOBILE: CARE REQUIRED.** The driver of an automobile when approaching a street crossing in the main business part of a city, at a time when the streets are occupied by other vehicles and pedestrians, should have his automobile under control, should keep a sharp lookout, and should manage his car as to its rate of speed and otherwise with due regard to the safety of others, and should stop if necessary to avoid injuring any one who for any cause is found to be in a place of danger.
3. **Negligence: CONTRIBUTORY NEGLIGENCE.** One who becomes frightened and bewildered at the near approach of an automobile while crossing a public street, and for that reason fails to avoid a collision, is not as a matter of law guilty of contributory negligence.
4. **Venue: CHANGE OF VENUE: DISCRETION OF COURT.** In passing on a motion for a change of venue the district court is vested with a sound legal discretion, and his ruling thereon will not be disturbed unless it appears that he has been guilty of an abuse of such discretion.
5. **Damages.** Evidence examined, and found sufficient to sustain the verdict, and that the amount thereof is not excessive.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

William Sykes, Carlton C. Marlay and Lionel C. Burr,
for appellant.

C. O. Whedon and Morning & Ledwith, contra.

BARNES, J.

Action to recover damages for death by wrongful act. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the defendant was driving his automobile on Twelfth street, in the city of Lincoln, on the 29th day of April, 1908, and, while going north over the crossing where that street intersects with O street, his

Smith v. Coon.

car struck and killed one Nellie Smith. The plaintiff was appointed administratrix of the estate of the decedent, and brought this action to recover damages sustained by her next of kin by reason of her death. On the hearing of this appeal there was some criticism of the allegations of plaintiff's petition, but we are satisfied from an examination of the record that the averments of negligence, which are somewhat general in their nature, are broad enough to sustain the verdict and judgment of which the defendant complains.

Defendant's first assignment of error is that the trial court erred in not sustaining his motion to instruct the jury to return a verdict in his favor, and in giving instructions numbered 12, 13 and 14. If we were to view this assignment in a technical sense, it could be disposed of under the rule that, where errors are assigned in a group, if any of the matters complained of are correct, the whole assignment must fail. We have concluded, however, to treat them together as a single assignment, and in the order presented in defendant's brief. It will be observed that at the very outset this assignment raises the question of the sufficiency of the evidence to sustain the verdict, for, if the evidence is insufficient, then it was error to overrule the defendant's request to direct a verdict in his favor.

It appears, without dispute, that the deceased and her sister Lizzie were at the store of Miller & Paine, situated on the corner of O and Thirteenth streets, in the city of Lincoln, at about half past 12 o'clock on the day when the accident occurred; that they were both employed by the Griswold Seed Company at its establishment on the corner of Tenth and N streets, and were on their way to their place of employment when the deceased was killed; that together they proceeded west along the south side of O street; that, when they reached a point on the Twelfth street crossing about half way between the curb line and the east rail of the Citizens Street Railway track, they saw the defendant's automobile approaching

them from the south at a distance of about 75 feet; that the speed of the approaching car frightened and bewildered them; that they hesitated and stepped back and forth in an effort to determine which way the automobile would turn in order to pass them; that as the car came on they failed to avoid it, and the deceased was struck upon her left side and thrown violently to the pavement, sustaining injuries of which she died within half an hour; that the crossing where the accident occurred is situated in the main business part of the city, and is at all times, and especially at the noon hour, congested by passing vehicles and by pedestrians on their way to and from luncheon; that this was the condition at the time in question, and therefore the killing was witnessed by a large number of persons who have testified for and against the defendant. The plaintiff, who was with the deceased at the time when she was struck by the defendant's car, locates their position as just west of the center of the space between the east rail of the street car track and the curbing when they discovered the approaching car. She testified that the car was north of the alley and just south of the crossing over which they were passing, and was coming directly towards them at such an excessive rate of speed as to frighten and bewilder them; that they hesitated and moved slightly east and west in an attempt to determine which side of them the defendant would pass, and before they could get out of the way the car, without slacking its speed, struck her sister and lifted her up and threw her some distance; that her head struck the pavement, and thus were inflicted the injuries of which she immediately died; that when her sister was struck they were facing towards the car, the deceased being east of the plaintiff, and that the car grazed plaintiff as it passed; that she heard no warning, and her attention was called to the approaching automobile by reason of its excessive speed.

One Hall, who at that time was crossing O street diagonally from the corner of the Burr block to the corner

of the Funke building, stated, in substance, that he saw the deceased and her sister on the crossing; that he also saw the car approaching them, and ran to the west side of the car tracks in order to reach what seemed to him a place of safety; that the deceased and her sister were in a direct line between him and the approaching car when he first discovered it, and that the car was coming directly towards them at a speed of at least 15 miles an hour, and was about 75 feet distant from them when he saw the deceased and her sister bewildered and hesitating upon the crossing in an apparent effort to avoid being struck by it; that he heard the thud of the car when it hit the deceased, and the noise made by her head when it struck the pavement; that he heard no gong or horn or warning of any kind; that the car, after striking the deceased, turned slightly to the right, ran about 75 feet to the northeast, and was stopped upon or just north of the street car track upon O street; that the defendant backed the car towards the south curb of that street, and that he heard him say, "She saw me coming. Why didn't she get out of the road?"

A Mrs. Crosse saw the accident. She testified that the car was south of the alley, going very fast, when she first discovered it; that she saw the deceased and her sister upon the crossing; that the car came on without any apparent slacking of its speed; that she heard a scream and thud when it struck the deceased.

One Doctor Brown, at the time of the accident, was at or near the southwest corner of the Burr block on O street. He saw the car approaching from the south, and testified that it was north of the alley when he first discovered it; that it was going about 10 or 15 miles an hour; that he heard no warning; that he saw the two ladies, one of whom was killed; that the car was approaching them in a direct line, and they seemed bewildered and did not know which way to go to get out of the way; that the deceased was struck and thrown to the pavement, and that it was all over in an instant; that the car ran about 70 feet after it struck the deceased.

Ray Elliott testified, in substance, that he saw the machine going past his place of business, which is situated on the east side of Twelfth street and south of the alley running east and west through that block; that it was going twice as fast as automobiles usually go when passing his store. He estimated the speed at that point at about 20 miles an hour. That he heard no warning of any kind.

J. W. Johnson was on the west side of Twelfth street, between the alley and the O street crossing. He testified, in substance, that he saw the defendant's automobile pass; that it was going so fast towards the people on the crossing as to cause him to fear an accident; that he saw the woman struck; that the automobile ran partly across O street and stopped north of Young's cigar store; that he estimated the speed, when it passed, at about 12 miles an hour; that it did not seem to slacken speed; that he heard no alarm sounded.

A Mrs. Goetting saw the accident, and her testimony as to the existing conditions and speed was, in substance, the same as that given by Ray Elliott.

One Grover Archer saw the accident, and testified in substance that the automobile was going faster than they usually go. He estimated its speed at 15 miles an hour, which was not diminished as it approached O street, and that he heard no alarm sounded.

W. H. Carson was standing on the curb at the northwest corner of Rector's drug store, which is situated on the corner of Twelfth and O streets and on the east side of the Twelfth street crossing. He stated that he saw the defendant's machine north of the alley which is situated south of the drug store; that it was about 75 feet from the deceased at that time, and was going at least 15 miles an hour; that its speed was what attracted his attention to it; that he spoke to a companion, and just then some one cried "He has struck a girl." His testimony was corroborated by his companion.

A Mrs. Garvey was at or near the place where the ac-

cident occurred; she heard a scream, and turned around quickly; she testified that a lady was lying on the pavement, and the driver was trying to stop the machine; that the auto passed her and went to the front of the barber shop, which is situated under the Burr block.

A Mr. Turner, by his testimony, also corroborated the plaintiff and her other witnesses as to the description of the accident, the speed of the automobile, and other essential particulars.

It is unnecessary to further review the plaintiff's evidence. The defendant testified that he saw the deceased when his automobile struck her; says he was going from 8 to 10 miles an hour when he crossed N street, which is a block south of where the accident occurred; that the machine was coasting; that he had it under perfect control, and had his hands on the wheel for the purpose of steering it wherever he wanted to go; that he was going only about 3 or 4 miles an hour when he reached the Twelfth street crossing; that he went over the crossing in the center of the space between the street car tracks and the east curb; that he saw the deceased and her sister when they started to cross the street about the time he crossed the alley; that he did not see them after he saw them crossing in front of his machine until he was within about two feet of the deceased, and at that time she was trying to get in front of his machine; that she ran against the machine and was knocked down. He also testified that at the rate of speed at which he was going he could have stopped the machine in from 6 to 10 feet.

Professor Richardson of the state university testified that he saw the accident, but was unable to fix the rate of speed; thought the machine was not going over 5 to 8 miles an hour. The defendant also succeeded in getting some testimony into the record to the effect that, in the opinion of the witnesses, if the deceased and the plaintiff had kept right along on their way towards the west side of Twelfth street, they would not have been struck; and, if they had turned back and gone to Rector's drug store

Smith v. Coon.

corner, the deceased would not have been killed. This testimony, while incompetent, was no doubt considered by the jury.

It thus appears that the evidence was conflicting, and therefore the question of the defendant's negligence was peculiarly one for the determination of a jury. It is quite probable, however, that the jury did not consider the defendant's testimony either convincing or persuasive. As a matter of law the deceased and the defendant were possessed of equal rights to the use of the crossing at the time the accident occurred, and if the deceased and her sister became frightened by reason of the negligent and excessive rate of speed at which the defendant was approaching them, and were thus rendered unable to get out of his way and avoid the accident, then it was his duty to stop his machine and thus avoid injuring them. *Simeone v. Lindsay*, 6 Pennewill (Del.) 224, 65 Atl. 778. To avoid liability defendant claimed that he did not see the deceased until she attempted to get in front of his car, but the jury must have concluded that it would not do for him to say that he did not see her, for the testimony is conclusive that from the time he crossed the alley until the deceased was struck she was directly in front of his machine, and he cannot avoid liability by saying that he did not see her. It was his duty to see her, and while driving his machine over a street crossing like the one in question, which was congested by the traveling public, to so approach it as to avoid injury to any one, and this is the meaning of that part of section 6248, Ann. St. 1909, which provides that the driver of an automobile, "upon approaching a crossing of intersecting public highways, or a bridge, or a sharp curve, or a steep descent, and also in traveling such crossings, bridges, curves, or descent, a person operating a motor vehicle shall have it under control and operated at a rate of speed less than heretofore specified, and in no event greater than is reasonable and proper, having regard to the traffic then on such highways and the safety of the public." It is quite apparent

that the defendant in this case failed to comply with the plain provisions of the statute above quoted, and we are therefore of opinion that the evidence in this case was sufficient to establish actionable negligence on his part, which was the proximate cause of the injury complained of, and the district court did not err in refusing to direct the jury to return a verdict in his favor.

Considering that part of this assignment which attacks instructions numbered 12, 13 and 14, it may be said that, if any one of the instructions complained of was correct, the assignment must be disregarded. However, we find, upon an examination of those instructions, that they are without error. They relate to the question of the defendant's negligence and the contributory negligence of the deceased, and it appears that those questions were fairly submitted to the jury.

It is strenuously insisted, however, that the deceased was guilty of such contributory negligence as precludes a recovery in this case. The evidence discloses that when the accident occurred the plaintiff and her sister were on their way to their place of employment, and were attempting to pass over the Twelfth street crossing; that when they reached a point half way between the curb and the east rail of the street car track, and as they were proceeding westerly, they saw the defendant's car directly approaching them at a rate of speed so excessive as to frighten and bewilder them; that they hesitated in their attempt to determine whether they should proceed or retrace their steps in order to reach a place of safety; that, while so hesitating, the deceased was struck and killed by reason of the fact that the defendant did not materially slacken the speed of his car or turn sufficiently to the right or left to avoid the impending collision. Under such circumstances, the question of contributory negligence was properly submitted to the determination of the jury, and their verdict seems to be fully supported by the evidence and the adjudicated cases.

In *McFern v. Gardner*, 121 Mo. App. 1, which was an

action brought by the plaintiff for damages on account of the death of her husband caused by a collision with the defendant's automobile, it was said: "In such case, although the deceased turned to the left instead of to the right, he was not therefore guilty of negligence as a matter of law because he was confronted with a sudden danger in the near approach of the automobile and could not in the emergency be required to exercise the best judgment."

In *Navailles v. Dielmann*, 124 La. 421, the court said: "The act of a pedestrian in running in front of an automobile as a result of terror, caused by discovering the automobile near him, is not voluntary, and it is not negligence." In that case it was held that "where a pedestrian, because of terror, ran in front of an automobile, and the operator saw the danger to the pedestrian in time to avoid the accident by stopping, but he failed to do so, and ran over the pedestrian, the operator was liable under the last chance doctrine."

Berry, Law of Automobiles, in sec. 163, under the heading of "Mutual Rights and Duties," says: "One has the right to assume that others will exercise care and caution to avoid injuring him, but there is imposed upon him a corresponding duty to use due care for the safety of others. Thus, one in charge of an automobile is bound to exercise care commensurate with the risk of injuries to others. It is his duty to keep a vigilant watch ahead for vehicles and pedestrians, and on the first appearance of danger to take proper steps to avert it."

In *Benoit v. Miller*, 67 Atl. (R. I.) 87, the facts were that an automobile was moving southerly on a street 72 feet away from where a pedestrian had started easterly and across the same street, and, when beyond the middle of the street, the pedestrian stopped and looked backwards towards the sidewalk and was immediately struck by a lamp on the automobile, and it was held that he had reached a point where he had a right to suppose the

automobile would avoid him, and consequently was not guilty of contributory negligence.

From the foregoing, we are of opinion that the evidence in this case was sufficient to warrant the jury in finding that the deceased was not guilty of contributory negligence.

We think the foregoing sufficiently answers all of the defendant's assignments of error, excepting his contention that the verdict of which he complains was excessive.

It appears from the Carlisle table of expectancy, which was introduced in evidence, that at the time the deceased was killed she had a life expectancy of 25 years; that she was earning \$60 a month, with every prospect of continuous employment; that she spent about \$100 a year upon her clothing and personal expenses, and the remainder of her wage, amounting to \$680 a year, was turned over to her mother for the support of herself and family; that at that time the life expectancy of her mother, who was her next of kin, was between 11 and 12 years. Deducting from the total prospective earnings of the deceased for that period her personal expenses, her board at \$3.50 a week, and her car fare of \$36 a year, and we have a net balance of more than \$5,000, which she would have contributed to her mother's support during the remaining period of her life. It follows that the verdict, which was for \$4,500, cannot be said to be excessive.

It is also urged that the district court erred in refusing to grant defendant a change of venue on account of the alleged bias and prejudice of the inhabitants of the county of Lancaster against drivers of automobiles. It appears that this question was submitted to the trial court upon affidavit evidence, and the motion for a change of venue was thereupon denied. It has been frequently held, where this question has been fairly submitted to and determined by the trial court, that, unless it clearly appears that there has been an abuse of discretion in refusing to grant a change of venue, the ruling of that court will not be disturbed. From a careful examination of the

Blado v. Draper.

record in this case, we are of opinion that the order of the district court in refusing to grant a change of venue was the proper one.

Finally, it appears that the defendant had a fair and impartial trial; that his contentions were fairly considered, and his matters of defense were submitted to the jury under proper instructions; that the evidence is amply sufficient to sustain the verdict; and the judgment of the district court is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

**FREDERICKA BLADO, APPELLEE, V. THOMAS DRAPER,
APPELLANT.**

FILED SEPTEMBER 25, 1911. No. 16,524.

1. **Negligence: INJURY TO PEDESTRIAN: OPERATION OF AUTOMOBILE.**
The driver of an automobile upon a public street or highway, who, in attempting to pass a carriage from the rear, so carelessly and negligently handles his car as to strike the carriage and injure the occupant thereof, who is without fault, is liable for the injuries caused by such negligent act.
2. **Appeal: FINDINGS: REVIEW.** Where the district court has properly submitted a controverted fact to the jury for their determination, their finding thereon should not be set aside by a reviewing court, unless it can be said to be clearly wrong.
3. **Trial: REFUSAL OF INSTRUCTIONS.** If the district court has, on his own motion, fairly and fully instructed the jury on defendant's theory of the case, it is not error for the court to refuse defendant's request for additional instructions thereon.
4. **Evidence: OPINION EVIDENCE: SPEED OF AUTOMOBILES.** It is not reversible error to permit a witness, who is well skilled in the use of automobiles and is accustomed to handling and driving them, to testify as to the distance in which such a machine may be stopped when going at different rates of speed, where on the trial of a cause that question is or may become material.
5. **New Trial: NEWLY DISCOVERED EVIDENCE.** A new trial should not be granted upon the ground of newly discovered evidence where

Blado v. Draper.

such evidence appears to be merely cumulative or is of a doubtful or equivocal character.

6. Damages. Evidence examined, and found sufficient to sustain the amount of the judgment rendered by the district court.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

George A. Adams, for appellant.

George W. Berge, contra.

BARNES, J.

Action in the district court for Lancaster county to recover damages sustained by the plaintiff which are alleged to have been caused by defendant's negligence in driving his automobile upon one of the public streets of the city of Lincoln. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that on the 1st day of March, 1908, the plaintiff and her husband were driving south on Eleventh street in the city of Lincoln with a single horse and carriage, and were overtaken by the defendant who was driving his automobile; that, when they were a short distance north of the alley between A and B streets, the defendant, in attempting to pass their carriage, which was within four or five feet of the west curb and on the right-hand side of Eleventh street, and without any warning, struck the left hind wheel of their carriage with the front fender of his machine. The force of the collision lifted plaintiff's buggy bodily from the ground, bent the axle-tree, broke the reaches, and threw the plaintiff forward upon the dashboard and at least partially out of the carriage, and thus inflicted the injuries of which she complains. The foregoing facts relating to the accident are not seriously disputed by the defendant and may be taken as the basis for our consideration of his appeal.

1. Defendant's first contention, as stated in his brief, is that the judgment is not supported by the evidence.

From an examination of the bill of exceptions, it seems clear that defendant was negligent in not turning his automobile sufficiently to the left in attempting to pass the plaintiff's carriage so as to avoid the collision; and, unless there was some immediate and intervening cause which prevented him from so doing, it must be conceded that his negligence was such as would support the verdict and judgment of which he now complains.

To avoid liability, it was contended by defendant at the trial, and is now urged on his appeal, that when he was in the act of passing the plaintiff's carriage he was suddenly confronted by a little girl riding a bicycle directly in front of his machine, and, in order to avoid striking and killing her, he was compelled to turn suddenly to the right, and that this was the cause of his striking plaintiff's carriage. It appears that this was one of the facts litigated in the trial court and which was there submitted to the jury; that on that question there was a conflict of evidence, with a preponderance of the testimony against defendant. The jury found against him on that question, and we cannot say that the evidence was insufficient to sustain the verdict. From reading the record, it is apparent that the jury believed that the defendant was guilty of negligence in carelessly and recklessly driving his automobile at such a rate of speed as to cause the injuries complained of, and we are not at liberty to overturn their verdict.

2. The defendant's second complaint, as expressed in his brief and argument, is that the district court erred in failing to instruct the jury on the law of unavoidable accident as set forth in the fifth, sixth, seventh and eighth instructions requested by his counsel. It is conceded that an instruction was given on that branch of the case, but it is insisted that it was not sufficient and did not contain a full and correct statement of the law on that subject. An examination of the transcript discloses that by the fourth, fifth and sixth paragraphs of the instructions the trial court, on his own motion, fully and fairly informed

Blado v. Draper.

the jury of the legal effect of any unavoidable accident, and correctly submitted to their consideration the defendant's contention that the accident was occasioned by his attempt to avoid running down or striking the child whom he claims was riding a bicycle in front of his machine. Having so instructed the jury, it was not error to refuse defendant's requests.

3. Defendant's third contention is that the trial court erred in permitting witness E. E. Mockett to testify as to the distance in which an automobile could be stopped while running at different rates of speed upon Eleventh street, in the city of Lincoln. While this evidence was not very material, still defendant has failed to cite any authorities which tend to support his contention, and it is not at all probable that the reception of this evidence resulted in any prejudice to his substantial rights. The witness clearly qualified himself as an expert handler, driver and dealer in automobiles, and we are satisfied that the evidence complained of was properly admitted. The same may be said as to like evidence given by other witnesses, of which defendant also complains.

4. It is further contended that the district court erred in refusing to grant the defendant a new trial for and on account of newly discovered evidence. We have carefully examined the affidavits upon which the claim of newly discovered evidence is founded, and find that such evidence is at most merely cumulative; that it is also of equivocal and doubtful character, and the most that can be said in relation to it is that it sets forth the name of a little girl, whom it is claimed was seen near the place of the accident; but no such girl has been found, and none of the affiants state that they saw her in front of defendant's automobile at the time the accident occurred. Therefore we are unable to say that the trial court erred or failed to exercise a sound legal discretion in refusing to grant a new trial upon that ground.

5. Finally, it is contended that plaintiff was not seriously injured, and therefore the judgment is excessive.

Tomson v. Iowa State Traveling Men's Ass'n.

In disposing of this contention, it is sufficient for us to say that the evidence as to the nature and extent of the plaintiff's injuries and her present and probable future physical condition is to some extent conflicting; but it is clearly shown that she was seriously injured by the collision in question. It appears that the jury estimated her damages at the sum of \$3,000, which, upon a careful review of the evidence, the district court deemed excessive to the extent of \$1,000, and ordered a remittitur of that amount, and rendered a judgment against the defendant for the sum of \$2,000. We do not think we should attempt to substitute any opinion of our own for the verdict of the jury as finally approved by the trial court. That tribunal heard the evidence and saw the witnesses as they gave their testimony in open court, and we are unable to say that the judgment as finally rendered by that court is excessive.

Having disposed of all the defendant's contentions as they are presented in the brief of counsel, and finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED

SEDGWICK, J., not sitting.

ISABELLE MCHENRY TOMSON, APPELLEE, V. IOWA STATE
TRAVELING MEN'S ASSOCIATION, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,564.

Former opinion modified, and the plaintiff awarded judgment for \$2,500, with interest thereon at 7 per cent. from February 18, 1902, on condition of filing a remittitur.

REHEARING of case reported in 88 Neb. 399. *Former judgment vacated, and case affirmed on condition.*

BARNES, J.

The defendant has filed a motion for a rehearing, and contends that the opinion should be modified in so far as it holds that for its failure and refusal to file its constitution or articles of incorporation and by-laws with the auditor of public accounts, as provided by section 112, ch. 43, Comp. St. 1909, the defendant was not entitled to the use of its by-laws in making its defense in this case. It is probable that this portion of the opinion should be explained or modified, for it was not our intention to overthrow the well-established rule that, where the plaintiff introduces a part of the by-laws in evidence in order to establish his claim for indemnity, the defendant may read in evidence the other parts of such by-laws relating to that subject.

It is also contended that plaintiff's petition does not state facts sufficient to sustain a judgment in her favor. This matter was fairly disposed of by our former opinion, and the rule therein announced should be adhered to.

Complaint is also made because the ruling upon the defendant's motion to require the plaintiff to elect upon which cause of action contained in the petition she would rely was not disposed of. We think the opinion fairly holds that the petition contained but one cause of action, and that is our present view of the matter, and that a prayer for a judgment for \$5,000 on account of the death of the assured did not vitiate the right of the plaintiff to recover on the ground of total disability.

On the other hand, counsel for the plaintiff has filed a motion asking for a modification of our former judgment to the extent of allowing the plaintiff to recover the sum of \$2,500 with interest thereon from the 18th day of February, 1902, at the rate of 7 per cent. per annum for the total disability of the assured caused by the accident described and set forth in her petition.

From a careful re-examination of the record, it appears that the defendant is a fraternal beneficiary asso-

ion insuring traveling men against accident, disability and death by accident, and was formed, organized and carried on for the sole benefit of its members and beneficiaries, and not for profit. It also appears that plaintiff's husband, Hays B. Tomson, was a member of the association, in good standing at the time the accident occurred, and had paid all assessments made against him from the year 1892 to the day of his death; that he had accepted all of the conditions of the contract on his part to be kept and performed. The petition also sets forth that the accident occurred on the 18th day of February, 1902, and it is described in language which had been approved in *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 674. A copy of the benefit certificate is set out in the petition, and it was alleged that the terms and conditions of the same had become broken and the defendant had become liable for the total disability of the assured caused by said accident. It was further alleged that the deceased was on the 18th day of February, 1902, totally and permanently disabled by said accident; that he never recovered therefrom, and died from the effects; that the accident was the sole and proximate cause of his death.

It is true that the plaintiff prayed for a judgment for \$1000 on account of the death of the assured, but that it did not invalidate the allegations of the petition which showed a right of recovery for \$2,500 on account of permanent disability. It is now conceded that the plaintiff was not entitled to recover for the death of the assured, because such death took place more than 26 weeks after the accident occurred.

Upon the trial, that portion of the defendant's by-laws which provide for an indemnity of \$2,500 to be paid to the beneficiary in case of the permanent disability of the assured was introduced in evidence as a part of the deposition of one Deets who was secretary of the defendant company. All of the by-laws bearing upon this question were introduced in evidence, either by the plaintiff or

Blake v. West.

the defendant, and therefore the record contains sufficient evidence to sustain a judgment for that amount. It clearly appears that under the evidence and the pleadings the plaintiff is entitled to recover the sum of \$2,500, with interest on the same from February 18, 1902, on the ground of permanent disability caused by the accident. While the plaintiff's petition is not artistically drawn, still it was not attacked either by motion or demurrer, and, under the well-established rule that after judgment a pleading will be liberally construed, we deem it sufficient to sustain a verdict for that amount; and the error in instructing the jury on the theory of liability for a death loss was, under our present view of the case, error without prejudice.

This being the second time that this case has been before us, and it being quite evident that defendant is liable to plaintiff for \$2,500 for the total disability of the assured, together with interest thereon from the date of the accident in question, we deem it advisable and proper to terminate this litigation, and therefore our former judgment reversing the cause is set aside, and it is ordered that, if the plaintiff file a remittitur of all of the present judgment except \$2,500 and the interest thereon from February 18, 1902, to the present time, within 40 days from the filing of this opinion, the judgment of the district court to that extent will be affirmed, otherwise the judgment will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

FREDERICK H. BLAKE, APPELLEE, V. LAURENTINA A.
WEST, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,789.

1. **Adverse Possession:** ENTRY BY PERMISSION. Where the possession of real estate is the result of an entry upon the premises by per-

mission of the legal owner, such possession will not become adverse until some act is committed by the occupant rendering it so, and notice thereof is brought home to the owner of the legal title.

2. ———: ENTRY UNDER CONTRACT TO PURCHASE. One who enters into the occupancy of real estate under an oral contract to purchase it cannot afterwards obtain title thereto by adverse possession without showing that his occupancy had assumed an adverse character, and continued as such during the statutory period.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

L. H. Bradley, for appellant.

Henry E. Maxwell, contra.

BARNES, J.

Action in ejectment to recover lot 3, in block 13, Briggs' Place addition to the city of Omaha. The plaintiff's petition contained the usual averments in such cases, and the answer was a general denial. Both parties waived a jury and the cause was tried to the court. The plaintiff had the judgment, and the defendant has appealed.

Appellant contends that the judgment is not sustained by the evidence, and this is the only question presented for our determination. It appears from the printed abstract that the plaintiff established a complete paper title to the property in question, and this fact is not disputed by the appellant. It also appears that the real defense which was interposed by the appellant was adverse possession for more than the statutory period of ten years next before the commencement of the plaintiff's action. To establish her defense, she testified that she resided on lot 4, which adjoins the lot in question; that she went into possession of both lots in September, 1894, and that she bought the lots of one Erastus Benson on contract, in 1894, and was to pay in monthly payments; that she moved her barn onto lot 3, and that she had been in pos-

session of the lot ever since that time; that she set out trees, cut the grass, and seeded it down; that she was away for a time, and the weeds were allowed to grow; and that she paid the taxes for the years 1894 to 1897, inclusive. On cross-examination she testified that she never had any written contract for the purchase of either of the lots; that she obtained her deed to lot 4 in 1896; that she was to pay \$1,000 for lot 3 in instalments of \$30 a month, but that she had never made any payments thereon; that Mr. Benson told her to pay the taxes; that she paid them up to 1897, but had paid nothing since; that the lot had been sold for taxes before 1897, and also since that time. It appears that the barn in question was not placed on a brick foundation, and that the judgment in plaintiff's favor gave the defendant ample time to remove it. It further appears that shortly before the commencement of this action the plaintiff's attorney saw the defendant several times in order to see if some arrangements could not be made to obtain possession; that she then stated that she had a contract for lot 3, but had never made any payments except a few years' taxes; that when she heard of the foreclosure suit (through which the plaintiff's grantor obtained his title) she stopped paying taxes; that she moved off from the lot, and that some three months later she changed her mind and moved back again. She also requested that the bringing of this action be deferred until she could see Mr. Briggs, who was plaintiff's grantor, and get a deed to the lot from him; that her request was granted, and delay was had until it became apparent that she did not intend to take any steps to obtain the title, when this suit was commenced.

From this testimony it is apparent that defendant's claim of adverse possession really dated from the time alleged in the plaintiff's petition. It also appears, without dispute, that when the defendant first took possession of that portion of lot 3, upon which her barn was situated, she did so by permission, and therefore from that time on until she evinced a determination to maintain her

possession as against the owner of the lot her possession could not be said to be adverse. *Lanham v. Bowlby*, 79 Neb. 39; *Johnson v. Butt*, 46 Neb. 220; *Smith v. Hitchcock*, 38 Neb. 104; *Beer v. Dalton*, 3 Neb. (Unof.) 694.

A careful examination of the record satisfies us that the judgment of the district court was right, and it is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

JOSEPH H. EDMONDSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1911. No. 17,020.

1. **Embezzlement: DEFENSES: GUARDIAN AND WARD.** A guardian of the person and estate of a minor, who converts the money and estate of his ward to his own use, thereby violates the provision of section 121 of the criminal code; and the fact that he has failed to report to or make final settlement in the county court, after being served with a citation to make such settlement, is not a bar to a prosecution for the crime of embezzlement as defined in that section.
2. ———: **CONVICTION: SUFFICIENCY OF EVIDENCE.** The voluntary admissions of a guardian that he has used the money belonging to his ward, as his own, has expended it for his own private purposes, and is unable to replace or repay it, are admissible in evidence against him, and if supported by other competent evidence are sufficient to sustain his conviction of the crime of embezzlement.
3. ———: **PLEADING AND PROOF: GUARDIAN AND WARD.** Under an information charging a guardian with having embezzled a certain amount of money belonging to his ward, without describing it as being a part of any particular or specific fund, proof that the defendant has converted any money to his own use belonging to the ward will sustain the charge as laid.
4. ———: **DEFENSES: GUARDIAN AND WARD.** When a guardian has converted his ward's money to his own use, the fact that he would be justly entitled to a small portion of the money so converted as compensation for his services is not a complete defense to a prosecution for embezzlement.

ERROR to the district court for Hamilton county:
HARVEY D. TRAVIS, JUDGE. *Affirmed.*

John A. Whitmore and O. A. Abbott, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

BARNES, J.

The plaintiff in error, hereafter called the defendant, was charged with the crime of embezzlement of money belonging to his wards, under the provisions of section 121 of the criminal code. His trial in the district court for Hamilton county resulted in his conviction. By the judgment of the district court he was sentenced to be confined in the state penitentiary at Lincoln for a period of two years, and he has brought the case to this court by petition in error.

His principal contention is that the evidence is not sufficient to sustain the verdict. The record discloses that in 1895 the defendant was, by the order of the county court of Hamilton county, appointed guardian of the persons and estate of Fred Smith, Grace Smith and Goldie Smith, who were the minor heirs of one Fred Smith, deceased; that he duly qualified, gave proper bond, and took charge of the estate of his wards, which was of the value of about \$8,000; that thereafter he performed his duties as such guardian, and furnished the money to pay for the education and maintenance of his wards out of the funds in his hands belonging to their estate until the youngest of them became of age, which event occurred in the year 1909; that thereafter they requested him to make settlement, and insisted that he should at once pay over to them the remainder of the funds in his hands belonging to their estate. The defendant failed to comply with this demand. A citation

was issued by the county court, and served upon him, requiring him to make his report to, and settlement with, that court, as provided by law, but defendant disregarded the citation, and therefore no settlement has ever been made, and the amount due from him to his wards has never been definitely fixed or determined by the order of the county court. Without further attempt to compel defendant to make such settlement, the county attorney of Hamilton county commenced this criminal prosecution and filed an information against him charging him with the crime of embezzlement.

The first count of the information charged plaintiff with having embezzled and converted to his own use \$3,776.25, and by the second count he was charged with having embezzled and converted to his own use the sum of \$2,200, the money and property of his wards. The jury found him not guilty on the first count and guilty as charged in the second count of the information. We find upon an examination of the bill of exceptions that it was clearly shown that the defendant had actually received and from time to time had taken into his possession the money and property of his wards amounting to at least \$8,000; that according to his own testimony, given in his defense, he has used for his own purposes a part of that money amounting to much more than \$2,200, which was the sum the jury found he had converted to his own use.

It was argued that until the county court had, by the settlement of defendant's accounts, found the amount due from him to his wards, a civil action on his bond would not lie, and, therefore, until after such settlement, no criminal prosecution could be maintained. We think that this argument is unsound. That part of section 121 of the criminal code upon which this prosecution was based reads as follows: "Or if any executor, administrator, guardian, or assignee for the benefit of creditors shall embezzle or convert to his or her own use any money, property, rights in action, or other valuable

security or effects whatever, belonging to any individual, or company, or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, executor, administrator, guardian, or assignee, every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken, or secreted, or of the value of any sum of money payable or due upon any right in action so embezzled." It thus appears that it is not the failure of the guardian to make settlement or pay over to his wards the amount of money found due them which constitutes the offense; it is the fact of his conversion of such money to his own use which renders him guilty of the crime defined by the statute upon which the information in this case was founded. It is the use by the guardian, as his own, of the trust fund committed to his care which renders him criminally liable and for which a criminal prosecution may be maintained. While it is quite probable that, if the defendant had been able to replace the amount so used by him, such fact might have been successfully urged as a defense to the criminal prosecution; still the use of the fund as his own would be sufficient to constitute the crime of embezzlement as defined by section 121 of the statute above quoted. That the defendant so used at least as much or more than \$2,200 of the trust fund which had been committed to his care in this case seems to have been made clear by his own testimony and admissions, and we are therefore unable to say that the evidence does not sustain the verdict.

It is also contended that, the state having charged the embezzlement of a certain or specific fund in each count of the information, it was bound to prove the charge as laid beyond a reasonable doubt. In answer to this contention, it is sufficient to say that we do not so understand the information. It is true that the embezzlement of two certain sums of money was charged, but no specific money or fund was designated or described, and

proof that the defendant converted any of the money belonging to his wards to his own use and to the amount charged would be sufficient to sustain the verdict. We therefore hold that this contention is not well founded.

It is further contended that, so long as there was due the defendant any fees or compensation for his services as guardian, he had a lien upon the fund belonging to his wards, and therefore could not be convicted of embezzlement until such amount had been ascertained by the judgment of the county court. In support of this, counsel cite *Van Etten v. State*, 24 Neb. 734, and *McElroy v. People*, 202 Ill. 473. We think that those authorities have no relation to the facts of this case. In *Van Etten v. State* the defendant was the attorney of the complaining witness and had collected certain money for his client as such attorney. There was an unadjusted account between them for collection fees and for other services due from the complaining witness to defendant, and it was not contended that defendant had fraudulently converted the money in question to his own use, because he was claiming it as his own in payment for his services. The statute gave him a specific lien upon the particular fund in his possession, and it is clear that, while the amount of his compensation was being litigated, defendant could not be convicted of embezzling the money in question. In the Illinois case it appeared that the defendant was entitled to retain certain commissions out of the money there in question and was authorized to withhold the payment of it to her principal until such commissions were adjusted and paid, and it was held that, under that state of facts, she could not be convicted of the crime of embezzlement. In the case at bar the defendant was not entitled to a specific lien upon the fund of his wards, and he had no such interest in the trust fund as would give him the right to convert any portion of it to his own use. Again, it appears from his own testimony that after allowing him everything he claimed in the way of fees, disbursements, and compensation for services, he had con-

Southern Realty Co. v. Hannon

verted to his own use a much larger sum of money belonging to his wards than the amount of the verdict of which he now complains.

Finally, it is contended that the court erred in receiving in evidence the defendant's admissions made to the witnesses Henning and Sidner. No authorities are cited in support of this contention, and, in view of the well-established rule that the voluntary admissions of one charged with a criminal offense can be used in evidence against him, we are satisfied that this evidence was properly received. A careful examination of the entire record satisfies us that the defendant had a fair trial, and, no reversible error appearing therein, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

**SOUTHERN REALTY COMPANY, APPELLEE, v. DANIEL
HANNON, APPELLANT.**

FILED SEPTEMBER 25, 1911. No. 16,515.

1. **Contracts: CONSIDERATION.** A consideration does not necessarily consist of a direct advantage to the promisor, but may consist of a direct disadvantage to the promisee.
2. **———: CONSTRUCTION.** Evidence examined, and *held* that section 341 of the code should be applied.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. Affirmed.

Murdock & Pancoast, for appellant.

J. D. Ringer, contra.

LETTON, J.

This action was brought to compel the defendant to

remove certain iron shutters or hoardings which were placed over six windows in a party wall built between the respective properties of the plaintiff and defendant, and to restrain him from maintaining the same.

The facts are that in the fall of 1906 the plaintiff began the erection of a brick building on a certain lot in the city of South Omaha adjoining the lot belonging to the defendant. Previous to this time plaintiff's grantor and the defendant had entered into a written agreement afterwards assigned to plaintiff, the terms of which the wall was to be constructed half upon the property of each, and when the wall was used by the defendant he should pay to the plaintiff one-half of its actual cost. Plaintiff began the construction of the building, and after the foundation was laid the defendant began the construction on his lot of a building which was longer than the plaintiff's building. Plaintiff built the party wall to a distance of about 39 feet from the front, then left an air space or light well through the width the entire length of the plaintiff's building. Beyond this built a wall, one-half on each lot, extending to the alleyway. There was no agreement as to the construction of the latter wall as a party wall. In the construction of the party wall the plaintiff left six windows on the first story opening into the air well or light space as referred to. The buildings were completed about the middle of May, 1907. Mr. Hall, the president of the plaintiff corporation, testifies that no objections were made by Mr. Hannon, the defendant, to leaving these openings in the party wall, although he was a witness to the buildings constantly during their erection. At the completion of the building Mr. Hall presented a bill to the defendant for the cost of his one-half of the party wall. The defendant refused payment, for the reason that the party wall was not a solid wall on account of the openings having been left in it. The plaintiff then procured brick and mortar and employed men to

window openings. They had begun this work when one McAuley, who was occupying rooms whose windows would be closed if this were done, requested the defendant to allow the windows to remain open. After some parley between Hannon and McAuley this request was granted, if McAuley would stain the windows. So far the facts are undisputed.

Plaintiff testifies that at this time he was informed by McAuley of this conversation; that he then called Mr. Hannon by telephone, and told him that he had men employed and material on hand to close the windows, but that if Hannon would consent to them remaining open he would discharge the men and pay their charges; that Hannon then told him that he might leave the windows open, and that, relying upon this agreement, plaintiff paid the men for the hauling, for the mortar wasted, and for their time, which amounted in all to \$9. On the other hand, the defendant denies ever holding any conversation over the telephone or otherwise in which Hall informed him of his intention to close the windows and of his having men and materials on hand ready to do so, and denies giving him permission to let the window openings remain. He further testifies that before the buildings were erected he tried to make an agreement with Hall that each should leave a space for light and air, but that Hall refused, saying he could get all the light he needed from skylights. He admits, however, that he knew the openings were being made after the erection was begun, but says that he never consented to the windows being placed in the wall.

Afterwards plaintiff began suit in county court against defendant to recover \$625.62 as the cost of his share of the party wall. Pending the action, negotiations were had between the parties and their attorneys as to the settlement of their differences. The points in dispute seemed to be the erection of the extension wall by defendant upon the lot line without agreement, also a claim by defendant for the building of an additional 18 inches in

height upon the party wall to correspond with the existing walls of his building, and the matching window openings in the party wall. A settlement was reached, and in accordance therewith, on the 1st of September, a new party wall agreement was entered into covering the wall constructed by plaintiff under the original party-wall agreement and also the new fire wall constructed by the defendant. At the same time the action in the county court was settled by the following stipulation. This recited that the defendant had paid the plaintiff \$593.27, with \$2.85 costs, in full for one-half the party wall in controversy, in accordance with the first party-wall agreement; that the plaintiff had paid the defendant by credit on the claim \$13.35, for one-half of the fire wall built by defendant above the party wall constructed by plaintiff. The stipulation contained the following provision: "And further as a settlement of the party wall in controversy, the plaintiff has allowed as a credit on the claim \$13.35, and the defendant has allowed as a credit on the claim \$580.92, for the party wall in controversy, on account of the window openings in the party wall in controversy, the plaintiff has allowed as a credit on the claim \$13.35 and that the case is fully settled."

The rights of the parties in this case depend upon the construction to be given to the stipulation. If it is intended to mean, as the plaintiff insists, that all matters in dispute between the parties, including the right to retain the window openings in the party wall, were adjusted and settled, then the plaintiff's position prevails. On the other hand, if, as the defendant insists, the only purpose and meaning of this clause was to acknowledge the fact that the plaintiff had allowed a credit at that time one-half the estimated cost of the window openings, and it was understood that he would be compelled to pay the same until the window openings were filled with brickwork, it would be a strong circumstance tending to show that the defendant had no intention of abandoning his contention that the party wall should be a solid one.

Some months after the making of this stipulation and the dismissal of the suit, a sharp dispute arose with respect to the disposition of rain-water falling upon the roof of defendant's building. McAuley afterwards moved out of the rooms, and then defendant closed the windows by nailing sheets of iron over the openings. To remove these obstructions and compel defendant to leave the windows open is the purpose of the suit. Defendant answered, and prayed affirmatively that plaintiff be required to make the wall solid and close the openings. The district court found upon the facts for the plaintiff and granted the relief prayed. The court found substantially that, as a consideration for allowing the windows to remain, the material was hauled away and the expenses incurred were paid by the plaintiff, and that in the settlement entered into it was agreed that the windows should remain open for light and air.

Defendant contends that there was no consideration for the first agreement (even if made, which he denies), and that he understands the law to be that there must be some advantage moving from Hall to Hannon or some valuable thing passing to him as a consideration for permitting these openings to remain. It may be said, however, that a consideration does not necessarily consist of a direct advantage to the promisor, but may consist of a direct disadvantage to the promisee. If Hall, with Hannon's knowledge and consent, paid to a third party money which he would not have paid except on account of Hannon's agreement to forego his right to have the windows closed, this was as much a consideration as if he had paid the money to Hannon himself. *Faulkner v. Gilbert*, 57 Neb. 544. The evidence on this point is directly conflicting, but it seems reasonable that Hall would not have discharged the men and paid the money unless some agreement had been made with Hannon whereby he was induced to change his purpose, which was so far executed that work had been begun to remove the woodwork in the openings.

Southern Realty Co. v. Hannon.

We are further of opinion that all matters in dispute were intended to be settled at the time the stipulation was entered into and the new party wall agreement made. At least, this was the view taken by the plaintiff's attorney, Mr. Baird, and by plaintiff himself. While defendant and his witnesses say the matter settled as to the windows was only the cost of filling them, plaintiff's witnesses say it was the intention to settle the whole controversy. Plaintiff testifies he paid the same amount for the openings to the contractor as if the wall had been solid, and that in the settlement he allowed the defendant the credit claimed therein as a consideration for, and to settle the dispute as to, his right to keep them open. The code, section 341, provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." We think defendant had reason to believe from all the circumstances that the language of the stipulation was understood by plaintiff to settle the whole matter as to his right to keep the windows open, and under the code provision the sense in which plaintiff understood it must prevail. At the beginning of this controversy defendant no doubt had the better right, but by his assent to the payment and discharge of the workmen and by his subsequent settlement he waived his right to insist that the windows be closed.

The judgment of the district court appears to us to be justified by the law and the evidence, and it is

AFFIRMED.

STATE, EX REL. LOUIS HUTTER, SR., APPELLEE, v. PAPILLION DRAINAGE DISTRICT ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1911. No. 17,177.

Highways: DUTY OF DRAINAGE DISTRICT TO CONSTRUCT CROSSINGS. It is the duty of a drainage district under the provisions of sections 110 to 113, inclusive, ch. 78, Comp. St. 1909, to make and keep in good repair good and sufficient crossings wherever the drainage ditch crosses the streets of an incorporated city or village.

APPEAL from the district court for Sarpy county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Courtright & Sidner, for appellants.

James T. Begley, contra.

LETTON, J.

This is an appeal from a decree awarding a writ of mandamus against the Papillion Drainage District requiring it to build and maintain bridges across its ditch where the same crosses certain streets in the village of Papillion.

The relator, Louis Hutter, Sr., pleaded and proved that by reason of the excavation of the ditch he was prevented from having access by way of Addition street to his land lying to the south of the ditch, whereon his slaughter-house was situated, and prayed that a writ of mandamus be issued compelling the respondent to build a bridge or crossing on that street. The respondent's answer admitted the existence of the street and its refusal to build a bridge, pleads that it acquired a right of way by condemnation across the streets of the village and has paid damages to the village therefor. It is further pleaded that it is not feasible or practicable to build bridges across the streets for the purpose of connecting the village with the territory to the south, but that the "reason-

able, practicable and economical remedy" is to lay out a new street from Washington street, where a bridge now exists, along the south margin of the ditch to connect with Addition street. After the answer was filed the village of Papillion filed a petition in intervention, setting forth substantially the crossing of four streets, including Addition street, by the ditch, the obstruction of the streets thereby, and the necessity for bridges, and praying that the respondent be compelled to erect approaches and bridges on each of the streets. The answer to this petition in intervention is substantially the same as to that of the relator. The court found that the streets had been obstructed, that bridges were necessary, and that it was the duty of the respondent to erect sufficient crossings over the ditch at the points named. It further found that the allegation that a more practical remedy was to lay out a new street was immaterial and constituted no defense. From this judgment respondent appeals.

The appellant contends that the statute (Comp. St. 1909, ch. 78, secs. 110-113) by its terms does not apply to drainage districts, and that the title is not sufficiently broad to include such districts. The title reads, "An act to compel railroad corporations and others to make and keep in repair crossings." Section 110 provides: "Any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own or operate, any railroad, canal, or ditch that crosses any public or private road shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary, within their right of way." It is argued that under the doctrine of *ejusdem generis* the words, "and others," apply to corporations or persons of a similar nature to railroads, and that, since we have held that a drainage district is of a purely public and administrative character, it is not of a similar character to a railroad corporation. It is further said that a drainage district does not "own and operate" a ditch, and that the

State v. Papillion Drainage District.

title and the language of the act show that it was only intended to apply to profit-sharing corporations. This argument is ingenious, but hardly convincing. We think it plain that the intention of the legislature was to place in the same class "railroad corporations and others" engaged in similar acts with reference to the highway; that is, other persons and corporations "who now own, or may hereafter own or operate, any railroad, canal, or ditch that crosses any public or private road." The classification is based, not upon the manner of the organization of the corporation or whether created for pecuniary profit or not, or whether the corporation is public or private, but is based upon the effect that its operations must necessarily have upon the highway. It merely imposes a duty upon whoever—whether natural or corporate individual does not matter—obstructs a highway by the building of a railroad, or the excavation of a canal or ditch, to restore the way to a condition suitable for travel. We think that a drainage district is clearly one of the "others" named in the title.

The principal argument of appellant is that, since a drainage district is formed for public benefit, and not for private gain, it should not be compelled to spend its funds in the building of bridges; that it can only raise the necessary funds to carry on its operations by virtue of special assessments, which can only be levied to the extent of special benefits conferred upon each tract of land, and that in many cases, if the cost of building bridges were to be added to the cost of the ditch, the total expense would exceed the special benefits conferred, and that to so hold would defeat the beneficent purpose of the law permitting the organization of drainage districts. We think such a result may perhaps be possible, but it hardly seems probable, and, even if so, the legislature should be appealed to for relief, and not the courts. This statute has previously been considered in this court in the following cases: *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412; *Burlington & M. R. R. Co. v. Koonce*, 34 Neb. 479;

State v. Papillion Drainage District.

State v. Farmers & Merchants Irrigation Co 1; *Missouri P. R. Co. v. Cass County*, 76 Neb. opinions in these cases plainly indicate the court has heretofore taken as to the validity of It was pointed out by Judge ROOT in *Frankl v. Wilt & Polly*, 87 Neb. 132, that, independent of the duty of one who excavates a canal across a way to restore the way by the construction of a bridge and crossing seems to be well established. See also in the opinion, also *Cleveland v. City Council* 233, 29 S. E. 584; *Town of Conewango v. Shaw* Supp. 327. The district court held that the taking of another route was more feasible for public travel and defense, and in this no mistake was made. I do not for those who invaded the streets to say to them "There is a better way elsewhere." Probably by the action in a friendly spirit the necessity of bridge repairs and points specified might be done away with, but the questions are in question here, and not matters of accommodation. We see no reason to say that the statute does not apply to the facts in this case, or that it is invalid.

The case of *Heffner v. Cass and Morgan Counties* Ill. 439, cited and relied upon by respondent, is not in point. In that case it was held that a statute which imposed upon a county the duty of replacing a bridge removed by the commissioners of a drainage district did not violate the constitutional provision that no private property shall not be taken for public use without compensation for the reason that county bridges were public property, not private property. The court properly held that the legislature had power to provide by law for the construction, control and disposition of public bridges. It was the power, if it became necessary for a public purpose to widen a stream and to build a new bridge, to require the public road authorities instead of the drainage district to construct the bridge. But, even if this case were not good law, some of the language in the opinion has been approved by the later cases of *Commissioners of Union*

Perry v. Clark.

District v. Commissioners of Highways, 220 Ill. 176, *Morgan v. Schusselle*, 228 Ill. 106, *Commissioners of Highways v. Commissioners of Lake Fork Special Drainage District*, 246 Ill. 388, and *Bradbury v. Vandalia Levee and Drainage District*, 236 Ill. 36, in which cases the Illinois court takes substantially the same view of a like statute that we take in this case.

The legislature has control of the public highways, and also has control of the manner of construction of public ditches; it has the right to say as to which of the respective public bodies concerned shall construct a bridge where a ditch crosses a highway.

The judgment of the district court awarding the writ is correct, and is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

EDWARD PERRY, APPELLANT, v. A. B. CLARK, APPELLEE

FILED SEPTEMBER 25, 1911. No. 16,408.

WATERS: DRAINAGE OF SURFACE WATERS: INJUNCTION. A court of equity will not enjoin an upper proprietor from draining surface water from his land through tile drains in the natural course of drainage into the natural channels which nature has provided, and onto the land of a lower proprietor.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed.*

M. D. Tyler and A. R. Davis, for appellant.

George R. Wilbur, contra.

ROOT, J.

This is an action to restrain the defendant from collecting surface water and discharging it upon the plain-

Perry v. Clark.

tiff's premises. The defendant prevailed, and the plaintiff appeals.

The respective farms of the parties are separated solely by a north and south public highway. A valley or draw approximately 325 feet in width, having a fall of 25 feet to the mile, runs in a general northwest and southeast course through these farms, and continues thence southeastward to Dogtown creek. There is a fall of about two feet from the base of the hills to the line of lowest depression in the valley. The draw is about four miles in length, and furnishes a way for surface waters and melting snows. Little, if any, water appears upon its surface after ordinary rains in the summer season, but the soil is so saturated with moisture that cultivated crops cannot be successfully grown therein without drainage. At intervals along the line of lowest depression in the plaintiff's premises, flowing water has washed out well-defined ruts or shallow gulleys, and beneath the culvert in the highway and extending on both sides to within the fields of the respective litigants the water has formed a gulley or washout. The plaintiff owns the lower farm. Four years before this suit was commenced the defendant dug an open ditch about two feet wide and 18 inches deep the length of the valley upon his farm. In August, 1908, the defendant commenced to tile-drain this valley so far as it lay within the boundaries of his farm, and laid one line of six-inch tile parallel to the open ditch and a line of four-inch tile across the valley near his eastern boundary, so that the water collected in all of the tiles would discharge into the open ditch, and from thence pass into and across the highway onto the plaintiff's farm at the point where water always appeared when it flowed over the surface of the draw. The defendant intended and was prepared to lay one other line of six-inch and two other lines of four-inch tile parallel to the six-inch tile now in position, so as to concentrate the water collected therein at the point where water discharges from the tiles now in position. A temporary order of

injunction interfered with the completion of the tiling. The case was tried 14 weeks after the petition was filed, and the proof is undisputed that at that time the tile drains discharged a stream of water $1\frac{1}{2}$ inches deep and 9 inches wide into the ditch, and from thence onto the plaintiff's farm, and that no water appears upon the surface of the valley above the point of that discharge.

The plaintiff contends that the defendant's tile drains concentrate surface water diffused through the soil and discharge the water out of its natural course upon the plaintiff's premises in such unusual quantities as to materially injure his farm. The defendant asserts that the water within the valley, whether above or below the surface, by the force of gravitation tends toward the line of lowest depression, and thence proceeds downward to the creek; and that he may in the interest of good husbandry accelerate that flow without becoming liable to the plaintiff. In a sense the entire valley is a drain provided by nature for the drainage of a considerable territory. When flood waters are at their height the valley is the bed of a stream. As the flood waters subside, and after heavy rains in the drier seasons of the year, the water covers a narrow strip of land coincident with the line of lowest depression. We think it is clear that the water flowing from the tiling is not forced or influenced out of the natural course of drainage.

There is considerable evidence to the effect that, after the tiling shall have completed its office by draining the soil above the bed of the drains, no more water will pass from one farm to the other than if the tiles had not been laid, and that at the most the plaintiff at a slight expense may lead this water from the point where it enters his premises to the washed-out gulley on his farm. In any event the plaintiff's inconvenience will be so trifling that a court of equity should not interfere. The language of Decmer, J., in *Dorr v. Simmerson*, 127 Ia. 551, is so pertinent that we quote it: "In view of known conditions in this state, we are quite ready to hold that the owner of

Mapes v. Bolton.

the dominant estate has the right by ditches or to drain his own land into the natural and usual which nature has provided even though the quantity of water cast upon the servient estate may be somewhat increased." See, also, *Vannest v. Fleming*, 79 *Wharton v. Stevens*, 84 Ia. 107; *Obe v. Pattat*, 13 (Ia.) 903; *Aldritt v. Fleischauer*, 74 Neb. 66; *F Steinbruck*, ante, p. 129; *Peck v. Herrington*, 109 *Lambert v. Alcorn*, 144 Ill. 313.

The judgment of the district court is right, and

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NEIL H. MAPES ET AL., APPELLEES, v. HENRY B. APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,523.

1. **Waters: OBSTRUCTION OF DRAINAGE.** A lower proprietor unnecessarily obstruct a natural drain upon his own land without the upper proprietor's consent, so as to collect water and cast it back upon his neighbor's farm when it does not appear but for that obstruction, and to the injury of the neighbor's crops and land.
2. ———: ———. Section 1, art. III, ch. 89, Comp. St. 1907 authorizes a proprietor to drain his land by tile or open ditch so constructed as to discharge water into any depression upon his own premises, does not authorize him to do so as to permanently obstruct a natural drain, so as to prevent surface water from flowing therein in the natural course, and so as to injure his neighbor's crops and land.

APPEAL from the district court for Colfax.
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

C. J. Phelps, for appellant.

W. M. Cain, contra.

ROOT, J.

This is an action to enjoin the defendant from obstructing a natural drain within the boundaries of his farm. The plaintiffs prevailed, and the defendant appeals.

A public highway running north and south divides the respective farms of the plaintiffs and the defendant, which are within the valley of the Platte river. A natural drain, described as a "draw," which heads some distance northwest of the plaintiffs' farm, runs southeastward across that farm and the farm of the defendant until intercepted by a drainage ditch. The draw is $3\frac{1}{2}$ miles in length, from 20 feet to 100 feet wide, and its average depth is $2\frac{1}{2}$ feet. Several individuals whose farms are crossed by the draw have plowed its banks and bed so as to grow annual crops thereon. At other points cattails and willows grow in the draw and the native sod remains unbroken. There is some conflict in the testimony, but it fairly proves that after heavy rains the surface water from a considerable area collects in and runs off through the draw, which at times is bank-full of flowing water.

Prior to the commencement of this action the defendant and other individuals owning land northward from his farm caused a ditch to be constructed upon his farm parallel to its western boundary, and southward across the draw to another draw upon the farm, and the defendant constructed a dam across the draw first referred to, and in line with the east bank of the ditch. One civil engineer testifies that not to exceed one-half acre of the plaintiffs' farm will be overflowed should the dam back up the water flowing in the draw, while another engineer testifies that between 10 and 11 acres will be thus flooded. For the sake of argument, we may accept the testimony of the witness first referred to as the more accurate.

The defendant contends that the ditch is constructed according to an agreement between himself and his neighbors, including the plaintiffs; that he was merely protecting his premises from the ravages of surface water,

and that he has acted within the provisions of section 1, art. III, ch. 89, Comp. St. 1909. All of the witnesses testifying to the alleged contract say that nothing was said about obstructing the draw. The evidence is clear and satisfactory that the surface water from a considerable territory assembles in and flows through the depression in question. Five bridges, to accommodate public travel at points where highways cross the draw, have been constructed and are maintained by the public authorities, and one-half mile below the dam the Union Pacific Railway Company constructed and maintains a substantial bridge 15 feet in length to permit storm and flood waters to pass on in the bed of this draw.

The broad general rule that a proprietor may protect his premises from the flow of surface water has many qualifications to be considered whenever it is invoked to protect an individual from the complaint of his neighbor injured by interference with or diversion of surface water flowing in the natural course of drainage in a natural drain. In any event, the lower proprietor in excluding surface water from his premises must exercise ordinary care so as not to unnecessarily injure his neighbor. In the instant case the draw at the point of obstruction is 64 feet wide; the ditch from the draw northward is 20 feet wide, whereas from the draw southward the ditch is but 10 feet in width. We are inclined to accept the simple and unchangeable principles of mathematics and of hydraulics in coming to a conclusion that the ditch from the draw southward will not carry off the combined flood waters of the ditch to the north and of the draw, rather than to adopt opinions to the contrary given by some of the witnesses. There is no proof that it was necessary, in the exercise of good husbandry or for the purpose of protecting the defendant's premises, to prevent the ditch water from flowing eastward in the first draw, and it is plain that a sufficient way was not provided from the first draw southward for the combined waters that will flow in the draw and down the ditch from the north. In

Stephenson v. Murdock.

our judgment, and under the circumstances of this case, it was not necessary for the defendant's protection that he should obstruct the draw, and in making his improvements he has not exercised that care which a due regard for the plaintiffs' right requires him to observe. *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380; *Flesner v. Steinbruck*, ante, p. 129. The statute, *supra*, authorizes a landowner to drain his land in the natural course of drainage by constructing tile or open ditches so as to discharge water into any depression or draw upon his own premises, but it has no application to this case. It is the dam within the natural drain, and not the ditch which the defendant assisted in digging, that damages the plaintiffs.

The judgment of the district court is right, and it is

AFFIRMED.

SEDGWICK, J., took no part in this decision.

GEORGE T. STEPHENSON, TRUSTEE, APPELLEE, V. CHARLES M. MURDOCK ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1911. No. 16,742.

- 1. Appeal: CONFLICTING EVIDENCE: JUDICIAL SALE: APPRAISEMENT.** A finding of the district court based on conflicting evidence that real estate sold at judicial sale was not appraised too low will not ordinarily be disturbed on review.
- 2. ———: ———: ———: ———: PREPONDERANCE OF EVIDENCE.** A finding of the district court based on conflicting evidence, overruling a contention that the appraisers did not in fact view and appraise the property described in the decree, will be sustained in this court if the evidence preponderates in favor of that finding.
- 3. Judicial Sales: OBJECTIONS TO CONFIRMATION.** The fact that the sheriff did not sell one lot described in the decree is not ordinarily a good objection to the confirmation of the sale of other lots therein described.

Stephenson v. Murdock.

—: ORDER OF SALE. In a sale made by authority of a decree in equity, the court is the vendor and the sheriff its agent. An order of sale is not necessary to clothe the sheriff with authority to make the sale, and, if issued, will not control the decree.

—: CONFIRMATION: REVIEW. The clerk has no authority to withdraw from the operation of a decree part of a parcel of land therein ordered to be sold; but, if he does so, an order of confirmation will not be reversed if it appears that the defendants are not prejudiced thereby.

APPEAL from the district court for Gage county:
DEB M. PEMBERTON, JUDGE. *Affirmed.*

O. Kretsinger, for appellants.

D. McCandless and *E. N. Kauffman*, contra.

IT, J.

As is an appeal from orders overruling objections by the defendants to a judicial sale and to the confirmation thereof. The plaintiff prevailed, and the defendants appeal.

The action is in equity, and the decree directs the sale of the specifically described tracts of real estate to satisfy the plaintiff's demand.

An objection that the property was appraised too low was overruled by the district court upon a consideration of the conflicting affidavits, and the preponderance of the evidence upon this issue seems to be with the plaintiff. *Howe v. Lindley*, 63 Neb. 692.

Otherwise the defendants failed to sustain their contention that several tracts were viewed and appraised by the appraisers under an erroneous impression that they were included in the decree, whereas those thus described were viewed or appraised. An objection that one tract of land described in the decree was not appraised or sold was not, under the circumstances of this case, prevent confirmation of the tracts fairly appraised and sold.

An important contention is that the decree directs the

sale of a tract containing 21 acres and described as lot 16. After the decree was entered, but before the property was advertised for sale, the plaintiff moved the court to modify the decree by excluding from its operation so much of lot 16 as had theretofore been sold by the plaintiff to a Mr. Rawlins, amounting to three acres, and that without a ruling on the motion the plaintiff procured the clerk of the court to issue an order of sale wherein this part of lot 16 was excluded from the decree. The defendants objected to the sale, objected to the appraisement and to the confirmation, and now insist that their objections are good. The clerk had no authority to direct the sheriff not to sell a part of lot 16. The decree, and not the order of sale, was the sheriff's authority to sell. *Parrat v. Neligh*, 7 Neb. 456; *Jarrett v. Hoover*, 54 Neb. 65; *Passumpsic Savings Bank v. Maulick*, 60 Neb. 469. An order of sale cannot lawfully limit the power conferred by the decree. *Jarrett v. Hoover, supra*. Should the court have refused to confirm the sale? The court was the vendor and the sheriff its agent to carry its decree into execution. By confirming the sale, the court ratified its agent's actions. This it should not have done to the defendants' prejudice.

The proof is convincing that the 18 acres of lot 16 sold by the sheriff brought its fair and reasonable value. If the three acres excluded should have been sold, the sale may yet take place. It may be, as the plaintiff contends, that the three-acre tract had been theretofore sold and by an error of the draughtsman of the decree was not excluded therefrom. In that event the motion to correct the decree may yet be sustained.

We cannot understand why counsel did not procure a ruling on this motion before causing an order of sale to be issued. It appearing that the defendants were not prejudiced by the orders they complain of, the appeal is controlled by section 145 of the code, which commands us to disregard any error or defect in pleadings or proceedings which do not affect the substantial rights of the litigants.

Rossbach v. Micks.

judgment of the district court is therefore in all

AFFIRMED.

GWICK, J., took no part in this decision.

ROSSBACH, APPELLANT, V. GRAHAM MICKS, APPELLEE.

FILED SEPTEMBER 25, 1911. No. 16,527.

Mortgages: EXECUTION OF SECOND MORTGAGE TO CORRECT MISTAKE. Where parties to a recorded mortgage execute a second one on the same realty for the same amount to secure the same debt for the sole purpose of correcting a mistake in the first, and so express themselves in the body of the second instrument, its effect, when recorded, is to supersede the first, and the two constitute one mortgage, nothing having intervened to impair mortgagee's security.

Specific Performance: SALE OF LAND: NONPERFORMANCE OF CONTRACT. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or damages for breach of contract.

APPEAL from the district court for Greeley county:
AS R. HANNA, JUDGE. Affirmed.

B. Barry, I. L. Albert, J. J. Sullivan and Willis E.
for appellant.

R. Swain, T. P. Lanigan and J. M. Lanigan, contra.

BE, J.

specific performance of a contract obligating defendant to convey to plaintiff a half section of land in Greeley county, or the recovery of damages for failure to do so, relief sought in the petition. The contract was dated

October 20, 1906, and may be summarized thus: Defendant agreed to convey by warranty deed title in fee simple, clear of all incumbrances. The purchase price was \$12,000, plaintiff paying \$250 down and agreeing to pay the remainder, subject to a mortgage of \$6,000, March 1, 1907. These payments were conditions precedent to the conveyance, and the failure of plaintiff to make either was defendant's authority to declare a forfeiture of the contract and to retain as liquidated damages all payments made. Plaintiff did not pay or tender as purchase money any sum except the cash payment, and defendant did not execute the deed required by the contract. Under issues raised by the pleadings, the trial court, upon consideration of the evidence of both parties, found that plaintiff did not perform his part of the contract, and that by reason of such default defendant declared a forfeiture thereof. A decree dismissing plaintiff's action followed, and defendant was allowed to retain as liquidated damages the amount received by him on the purchase price. Plaintiff has appealed.

Before the time for performance had expired defendant submitted to plaintiff an abstract of title. It contained a reference to a mortgage executed by defendant in favor of John M. Hardy for \$3,000, in addition to the incumbrance of \$6,000 mentioned in the contract of purchase pleaded in the petition. In this connection plaintiff argues: March 1, 1907, and afterward, the record of the additional mortgage was a defect which prevented defendant from conveying the title purchased. Plaintiff was ready and willing to pay the purchase price, but was not required to do so or to make a tender thereof, since defendant refused to perfect his title and allowed it to remain in the condition described. The additional mortgage should have been released of record or canceled by a decree of court. By refusing to convey the title purchased, defendant was in default and could not require payment or a tender. Unless plaintiff is right in the position thus taken, there is no merit in his appeal.

The abstract of title submitted to plaintiff is in the record. Entry 26 relates to the 3,000-dollar mortgage in controversy. Defendant and wife are grantors and John M. Hardy is grantee. In the column under remarks this note is inserted: "Substituted by 27." Entry 27 is a duplicate of 26, with these exceptions: "James Hardy" instead of "John M. Hardy" is grantee, and the date of acknowledgment and the name of the notary are different. The remarks in entry 27 are: "Made to take the place of 26. See note 1 on back." The note last cited reads thus: "Clause contained in 27—mortgage from Graham Micks and wife to James Hardy: 'This mortgage is made in lieu of and to take the place of another certain mortgage of the same date, on the same land, for the same amount, by the same parties, to John M. Hardy, whose real and correct name is James Hardy, and the real and true mortgagee in both instruments.'" Both mortgages were made by the same parties to secure the same debt, and the second was executed to correct a mistake in the first. It was the purpose of the parties to substitute the second mortgage for the first, and the effect was to release the erroneous lien. The mortgage records so show. Plaintiff, however, argues: The parties to the corrected mortgage could only bind themselves by their contract, and there is nothing on the public records except their agreement to show that a John M. Hardy is not in fact the original mortgagee instead of James Hardy. If he is, he cannot be deprived of his lien by the contract of the parties to the later mortgage. This argument is refuted by evidence adduced at the trial. Defendant testified without objection that he was ready, able and willing to convey a good title March 1, 1907; that he would have done so had the purchase price been paid; that he had a conversation with plaintiff's attorney in relation to the mortgages and told him that the man who drew the first mortgage made a mistake, there being in fact only one mortgage; that defendant told him he had the mortgages and notes in his posses-

sion to show there was really only one mortgage. When asked what the attorney said, defendant replied: "He said that was all right; and of course he expected, when we made the deal, I would turn these notes and mortgages over to him." Defendant also testified that he notified plaintiff March 2, 1907, to put up at least \$1,000, giving him until March 5 to do so. There is no reason to disbelieve this testimony and it is accepted as the truth. It is sufficient to show, when considered with both mortgages, that the first would not prevent defendant from conveying a good title. By refusing to make the stipulated payments or a deposit or a tender, plaintiff was in default and is not entitled to specific performance or to damages. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. Under this elementary principle plaintiff's suit was properly dismissed.

The trial court also ruled correctly in allowing defendant to retain as liquidated damages the 250-dollar payment on the purchase price. Defendant believed in the good faith of plaintiff, procured an abstract of title, and prepared to vacate his farm. He sought a new home, sold part of his stock in contemplation of the change, and was otherwise damaged.

AFFIRMED.

SEDGWICK, J., not sitting.

OTTO DETTMAN, APPELLANT, v. G. K. PITTENGER ET AL,
APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,713.

1. **Highways: OPENING: SUFFICIENCY OF PETITION.** In a petition or a proceeding to open a county road, a description, though indefinite in some particulars, which will enable a surveyor or a person familiar with the locality to locate the line with reasonable certainty is sufficient in that respect for the purpose of conferring jurisdiction on the county board and of resisting a collateral attack by injunction to prevent the opening of the road.
2. ———: ———: **WAIVER OF IRREGULARITIES.** In a proceeding to open a county road, a person whose land will be taken for that purpose waives irregularities not affecting the jurisdiction of the county board, where he files a claim for resulting damages.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

O. E. Spear, H. C. Vail and F. J. Mack, for appellant.

O. M. Needham and W. F. Critchfield, contra.

ROSE, J.

This is a suit to enjoin the county board and a road overseer from opening a county road through a quarter-section of land owned by plaintiff in Boone county. The injunction was denied, and plaintiff has appealed.

Plaintiff bases his right to an injunction on the ground that in attempting to open the road the county board acted without jurisdiction, its order for that reason being void. The jurisdictional infirmities presented are: In the petition for the road the description is insufficient and the report of the viewer or commissioner does not supply the necessary information. The petition for the opening of the road contains the following description of the proposed route: "Commencing at a point 80 rods west of the southeast corner of section 28, township 20,

range 8 west, running thence north one mile and nearly a half, thence west 80 rods or joining the Old Ridge road that formerly ran to Akron, and following in a north-westerly direction the old survey as nearly as practicable through the northwest quarter of section 21, and through section 16 and section 19 and terminating at the northwest corner of section 9, township 20, range 8 west." The report of the viewer or commissioner appointed to report on the expediency of the proposed road is: "I have carefully viewed the ground specified in the foregoing road petition, and found nothing in the way to prevent its being a first-class wagon road with little, if any, expense to the county. There are no bridges to be put in or cuts or fills." The viewer also filed a plat showing the line through plaintiff's quarter-section, but courses and distances were not indicated by letters or figures. The county board made a formal order establishing the road. Plaintiff insists that a portion of the line cannot be definitely located by means of the language, "running thence north one mile and *nearly a half*, thence west 80 rods or joining the Old Ridge road," and that the viewer left no record supplying the necessary information or describing with reasonable certainty that portion of plaintiff's land required for the use of the public. The report of the viewer or commissioner being as indefinite as the petition, was the description sufficient to confer on the county board jurisdiction to open the road in the proceeding commenced by the filing of the petition for that purpose? Plaintiff had notice of the proceedings, but did not remonstrate against the opening of the road or object to the jurisdiction of the county board or to the report of the viewer, or in any other manner raise in that tribunal the questions now presented. Instead, he filed with the county board a 2,500-dollar claim for "damages by reason of the location of a county road over and across" the quarter-section of land in controversy, stating: "There is now a road on two sides of this quarter. The proposed road runs through the center of

quarter on the best land in the quarter." In passing his claim the county board allowed him \$300, and he appealed to the district court, where the matter is still pending.

Warren v. Brown, 31 Neb. 8, 18, it was said: "The directions to create a highway should be so definite and certain that a competent surveyor could, with the record in his hands, point out its location." In that case the starting point was uncertain, and the description in other respects was indefinite. In describing a proposed county road, however, the highest degree of certainty is not required. The generally accepted rule is: "If places are designated which will enable a surveyor or persons familiar with the locality to locate the way with reasonable certainty, the description will be deemed sufficient." *Cott, Roads and Streets* (3d ed.) sec. 380. This rule has been applied to descriptions requiring as high a degree of certainty as that required in petitions for highways.

Owen v. Chicago, B. & Q. R. Co., 86 Neb. 851. The description in the petition filed with the county board does not show on its face that a person familiar with the locality cannot locate the way with reasonable certainty, nor is that fact established by a preponderance of evidence. The road in controversy is not on a railroad line. The law did not require defendants to open up the exact route described in the petition. The county board had authority to make changes in the line when acquiring jurisdiction. According to the statute the county auditor or commissioner "is not confined to the particulars of the petition, but may inquire and determine whether that or any road in the vicinity answering the same purpose, and in substance the same, be re-opened." Comp. St. 1909, ch. 78, sec. 7. When plaintiff received notice of the petition, he knew, therefore, that the width of the statutory width, varying in places from the width originally contemplated, might eventually be opened through his land. It follows that the rule which does not require technical accuracy in the description is

Dettman v. Pittenger.

in harmony with the spirit of the statute, which permits changes in the line actually described. In *Fremont, E. & M. V. R. Co. v. Mattheis*, 39 Neb. 98, it was held: "Where a petition for appraisers to assess damages on account of the appropriation for right of way purposes of a strip 100 feet wide through a particular tract of land refers for a more specific description to an accompanying plat, which shows the location of the road through such tract, but without letters or figures to indicate courses and distances, such description will be held sufficient when assailed in a collateral proceeding."

In the present case the description is not so uncertain as to invalidate the entire proceeding before the county board, but is sufficient to resist plaintiff's collateral attack. The uncertainty in the petition and in the report of the viewer is an irregularity which plaintiff waived by filing his claim for damages on account of the establishment of the road. *Hoye v. Diehls*, 78 Neb. 77; *Davis v. Commissioners of Boone County*, 28 Neb. 837. Plaintiff has not established a right to an injunction. No error has been found, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

REESE, C. J., concurring.

I concur in the decision in this case upon the ground that by filing his claim for damages and appealing from the award of the county board the plaintiff has voluntarily placed himself in a position which deprives him of the right to the equitable remedy of injunction. He cannot demand damages for the location of the road and at the same time deny the jurisdiction of the board in establishing it. He is not entitled to both remedies.

I agree that the filing of the petition, although defective, conferred jurisdiction upon the board. I also agree with the holding that a proper report by the com-

missioner to view the proposed road would have cured the defect. But it appears that the commissioner failed to perform his duty in that regard, and it is still in doubt as to where the change in direction "one mile and nearly a half" north of the initial point would occur. It may be at the quarter east and west line in section 21, or it may not. Other descriptions appear to be in compliance with the law. The county board should have rejected the report of the commissioner and caused him or some other person to establish the point of change in direction by proper measurements, or other apt description. This may yet be done, and the exact location of the road made a matter of record in order that future complications may be obviated. If this has not been done, the board should see that it is accomplished without further delay.

Root, J.

I concur on the sole ground that, since the plaintiff does not allege there is any difference between himself and the highway officials concerning the land embraced within the highway as located by the commissioner, the plaintiff by filing a claim for damages and appealing from the award is estopped to maintain this action.

LETTON, J., concurs in above.

EMIL MUDRA ET AL., APPELLANTS, v. HERMAN GROELING,
APPELLEE.

FILED SEPTEMBER 25, 1911. No. 16,521.

Acknowledgement, Authority to Take. M., being indebted to various banks and individuals who held chattel mortgages upon all of his personal property, sold his homestead, consisting of

Mudra v. Groeling.

160 acres of land, to G., and, his wife joining, executed a deed therefor to G. At the time of negotiating the sale, and prior to the execution of the deed, M. directed G. to pay the consideration for such sale, less certain incumbrances upon the land, to the creditors of M. One of the creditors of M. was D., who, as a notary public, took the acknowledgment of M. and wife to their deed to G. D. was in no manner instrumental in causing the sale of the land or the giving of such oral directions by M. to G., but immediately prior to taking such acknowledgment D. was informed of such sale and oral directions. After the execution of the deed, G. paid the full amount of the net consideration of his purchase of the homestead to such creditors of M., including D. *Held*, That D. was not disqualified to act as notary in taking such acknowledgment.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. *Affirmed*.

J. F. Green and W. A. Meserve, for appellants.

J. H. Berryman and Calvin Keller, contra.

FAWCETT, J.

Plaintiffs brought suit in the district court for Knox county to set aside a deed to their homestead, consisting of 160 acres of land in said county, and to quiet their title thereto, and from a decree of the district court dismissing their suit and quieting defendant's title to the land in controversy they prosecute this appeal.

It is not disputed by plaintiffs that on January 22, 1909, they signed the deed in controversy, but they contend, first, that at the time they signed the deed they thought it was a mortgage; and, second, that T. A. Drayton, who took the acknowledgment, had such an interest in the transaction as disqualified him from taking the same. In other words, that the deed was never acknowledged in accordance with the statutes of this state relating to the conveyance of a homestead. The latter point is the only one argued in plaintiffs' brief, and hence is the only one that will be considered here. Owing to the unfortunate condition in which the decree of the district

leaves the plaintiffs, we have examined this case with great care. The writer has twice carefully read the record. It would serve no good purpose, and unnecessarily extend this opinion, to set out the facts of the respective parties in detail. We think a preponderance of the evidence shows that on January 1, 1909, plaintiff Emil Mudra was to all intents and purposes a bankrupt. He was heavily indebted to banks at Orchard, Nebraska (which, for brevity's sake we will designate as the Farmers Bank and Citizens Bank, respectively), and to certain individuals who were officers and stockholders in those banks. The only property held by the banks consisted of chattel mortgages on the personal property of Emil. He was also indebted to the defendant in the sum of approximately \$10,000, a portion of which was also secured by a chattel mortgage. On the day named a representative of each of the two banks together visited the farm of the plaintiff for the purpose of checking up their several chattel mortgages and ascertaining whether or not plaintiff's property had the live stock purporting to be covered by them. They were unable to find all of the stock upon the farm, but were told by Emil that something like 30 per cent of the stock was at another place about 15 miles distant. The representatives of the banks had obtained a subpoena duces tecum from the county clerk of the county in which the tract from the county clerk of the chattel mortgages which had been given by plaintiffs. Their examination satisfied them that their security was insufficient, and that there would be some difficulty in determining the rights of the several mortgagees on account of the manner in which plaintiff Emil had listed the property when giving the various mortgages. While they were at the farm the question of a public sale of all of the plaintiffs' personal property was discussed. Plaintiff says the sale was suggested by the representatives of the banks, but they say that it was suggested by plaintiff. However that may be, the representatives of the banks insisted upon a new chattel mortgage, running

Mudra v. Groeling.

jointly to a representative of each of the two banks, covering the entire stock. Such a chattel mortgage was drawn, and signed by plaintiff Emil. It was then agreed that a public sale should be held in the near future and all of the property sold; that representatives of the two banks should act as clerks at that sale and handle and distribute the proceeds among the creditors *pro rata*. After the chattel mortgage had been signed, the representatives of the banks prepared a mortgage upon the homestead, subject to two prior mortgages, one for \$1,600 and the other for about \$200, as additional security to their loans. Plaintiff Emil signed this mortgage, but Mrs. Mudra refused to join, insisting that the personal property ought to pay the banks what was due them. Thereupon the bank representatives started home. On their way they stopped at the home of defendant, whose farm adjoined that of the plaintiffs, where they remained for supper. During their interview with defendant they asked him how much of a claim he had against plaintiffs. Defendant was unable to state the exact amount, but gave it approximately. The bank representatives then asked defendant if plaintiff had 30 head of stock at another place 15 miles distant. Defendant answered to the effect that it was possible plaintiff had such stock, but that he had never heard of it, and doubted his having the same. It was then agreed between the representatives of the bank and defendant that, so far as they could consistently do so, they would act together in trying to protect their mutual interests. On the next morning, January 21, defendant appeared at the home of plaintiffs, and said to plaintiff Emil: "You're a deuce of a fellow to claim to have 28 or 30 head of cattle out north; you are making things worse in place of better, and they are talking about sending you over the road." Defendant also said that he would like to help them out if there was any way he could do it. Mrs. Mudra testified that defendant said he would lend them \$800 or \$1,000 and take a second mortgage on their homestead. Defendant denies this, and says

Mudra v. Groeling.

his offer was to purchase the farm for \$4,000, with an agreement that they might have it back any time within a year if they would repay him his money with interest; that Mrs. Mudra was not satisfied with one year, but wanted to make it three years; that he objected to three years as being too long a time, but finally agreed to give them two years; that he told plaintiffs to think the matter over and telephone him that evening as to their decision, and, if they decided to accept his offer, to come over the next morning and they would go to town together and close the matter up; that some time that evening some one from plaintiffs' home telephoned to some member of defendant's family that they had decided to accept his offer, and would be over the next morning to go to town with him; that on the next morning, January 22, plaintiffs appeared at the home of defendant, and informed him that they were ready to go to town to carry out the arrangement; that he got into the buggy with them, and they started for Orchard; that he rode with them about two-thirds of the way when they were overtaken by a neighbor, and, on account of the crowded condition of the buggy in which they were riding, he rode the rest of the way with the neighbor; that while they were all riding together plaintiff Emil said to him, "Now, being as I have sold the place, I don't want to sell all of my personal property; I will keep out several of the best horses and some cows," evidently under the supposition that the proceeds of the sale of the land would reduce his indebtedness to such an extent that it would not take all of the personal property to pay the remainder. Plaintiffs deny that Emil made this statement. However that may be, when they arrived at Orchard, defendant went to the Farmers Bank, and told the cashier that he had bought Mudra's farm; that they had come to town for the purpose of executing the deed; and that under his arrangement with Mudra he was to turn over all of the cash coming to the Mudras from this sale to Mudra's creditors. Mudra went to the Citizens Bank, and made substantially the same

Mudra v. Groeling.

statement to the cashier of that institution. Mr. Drayton, the cashier, then telephoned to the Farmers Bank that the Mudras were there, and for them to come over. Thereupon, the cashier of the Farmers Bank and defendant went to the Citizens Bank, where matters were talked over by the cashier of the Farmers Bank, the president and cashier of the Citizens Bank, and the Mudras. Mr. Thornton of the Farmers Bank prepared a deed to the land from the Mudras to defendant. The deed was signed by both Mr. and Mrs. Mudra, and the acknowledgment taken by T. A. Drayton, cashier of the Citizens Bank. There is some conflict in the evidence as to whether or not the deed was read to the Mudras, but we think a clear preponderance of the evidence shows that, while the entire deed was not read to them, the description was read, the consideration, etc., and that the acknowledgment was formally taken by Mr. Drayton. After the deed had been signed, Mrs. Mudra spoke about the agreement that they should have a certain time within which to get the land back. Thereupon, Mr. Thornton prepared, and defendant signed, a written defeasance as follows: "Orchard, Nebr., Jan 22 1909 I Herman Groeling, having this date bought of Emil Mudra the N W of 30-30-7 for \$4,000 in hand paid to said Mudra, do hereby agree to permit the said Emil Mudra to redeem said land at any time within two years from this date for the sum of \$4,000 with interest at 10% and on payment of any improvements which the said Herman Groeling may put on said property. (Signed) H. Groeling. In the presence of T. A. Drayton." This paper was given to Mrs. Mudra. Mrs. Mudra testified that, when she signed the deed, she thought she was signing a mortgage; that the written defeasance was not read to her, and that she did not know its contents until she returned home that evening, when she then discovered from the reading of that instrument that the paper which she had signed that day was a deed. instead of a mortgage. After the deed had been signed, defendant asked the bankers if they wanted the cash, or

like his notes, as he was a little short of cash. They replied that they were perfectly good for his notes. As they were unable then to ascertain the exact amount of the liens upon the land, they referred to Mr. Drayton, of the Citizens Bank, and to Mr. Thornton, of the Farmers' Bank, for \$400. Some 10 or 15 days thereafter, when the amount of the mortgages upon the land and the amount of taxes had been ascertained, it was discovered that the incumbrances were a great deal more than they had supposed, and that it would be necessary for the defendant to pay to the banks a small amount in excess of the notes which he had previously given. New notes were given for the increased amount, but the cash was less than \$100 in each case. These were subsequently paid by defendant. At the time the notes were had, the Citizens Bank, of which the defendant was cashier and a director, and, as we think the evidence clearly shows, a stockholder, held for collection the notes which it had held against Mudra, and which it had rediscounted at the First National Bank. It further appears that at the time this note was cashed at the Norfolk bank T. A. Drayton perceived the payment of the note, and this payment was still outstanding at the time of the trial now set out. A portion of the money received by Drayton from defendant as a part of the proceeds of the purchase of plaintiffs' land was invested by him upon this note, which he had personally cashed. This fact, together with the fact that the defendant was also interested as a stockholder in the Citizens Bank, forms the basis of plaintiffs' contention that he was disqualified to act as notary in taking the acknowledgment of the plaintiffs to the deed in question. At this point the case turns. The district court held that he was not disqualified, and in this holding the appellate court did not err.

From what has been stated that neither

Mr. Drayton nor his bank had anything to do with the purchase of the land from plaintiffs by defendant. That was purely a matter between them. Drayton was not advised of the sale and purchase until after its terms had all been agreed upon and the parties appeared at Orchard for the purpose of executing the deed. Nor does it appear that he was in any manner instrumental in the verbal direction given by Mudra to defendant to turn over to the creditors, of which Drayton was one, the cash consideration which otherwise would have been payable to plaintiffs. We are unable to see how the fact that plaintiff gave defendant this direction and subsequently permitted it to be carried out can be held to disqualify Mr. Drayton as a notary in taking the acknowledgment. The direction of Mudra to defendant to turn the money over to the creditors was verbal. It was not induced by Drayton, and, being for the proceeds of the sale of a homestead, could not, under our statute, have been enforced by him against defendant, if the Mudras, after executing the deed, had changed their minds, canceled their verbal direction to defendant, and demanded of him that he turn the money over to them. If they had taken that course, defendant would have been obliged to comply with their demand and pay them the money, and neither Mr. Drayton nor any of the bank officials could have prevented his doing so. That the Mudras knew defendant was going to pay the money over to the creditors, including Drayton, is beyond question, and we think a clear preponderance of the evidence shows that they knew when they signed the deed that it was in fact a deed, and not a mortgage. If they did not know it then, they at least knew it, according to their own testimony, that evening when they read the written defeasance which defendant had given Mrs. Mudra. After having read that paper and then learned that they had executed a deed to defendant for their farm, and knowing that he was going to pay the consideration of the sale to the creditors, they took no steps to prevent the consummation of the deal by defendant until the

Mudra v. Groeling.

commencement of this suit three weeks later. Defendant lived on the adjoining farm, and we think it is a fair inference that, if upon their return home that evening they found they had been deceived into executing a warranty deed when they thought they were only giving a mortgage, they would have appeared at defendant's home bright and early the next morning to repudiate the entire transaction. It may be said that they acted promptly in commencing this suit three weeks later, but there is another significant circumstance in the case which explains the commencement of the suit without any previous protest. As we have said, it was agreed between the representatives of the banks and plaintiff Emil at the time the representatives visited his farm and took the last chattel mortgage covering all of the property, which was two days prior to the execution of the deed, that they would have a sale and sell off all of the personal property; plaintiff stating that he wanted to sell everything and pay his debts. It was then arranged that the bank representatives should get out the sale bills and engage the auctioneers. This was done and the sale made on January 28. The sale of the personal property netted \$3,093.41, which was evidently much less than plaintiffs expected to realize therefrom. The proceeds of the sale of the land, after deducting the incumbrances, added to the amount realized from the sale of the personal property, did not entirely pay all of plaintiff's liabilities; so that he found himself, after the sale on January 28, without either farm, farm implements, or stock. It then evidently dawned upon plaintiffs that they had made a mistake in turning over their homestead, and it was after that that they probably consulted counsel and brought the present suit in an effort to regain it. We greatly sympathize with the unfortunate plight in which plaintiffs were left, but we are unable to discover any evidence of fraud, misrepresentation or overreaching on the part of the creditors. It was patent to plaintiffs on January 22, when they executed the deed, that they had made a failure of farming, that they would

Mudra v. Groeling.

in any event have to give up all of their personal property, and that all they would have left would be the farm which was incumbered for about one-half of its value. They evidently indulged the hope that, if they sold the land to defendant and applied the money which would be coming to them from such sale upon their indebtedness, they would have a surplus at the time of the sale of the personal property, which would enable them to retain some of the horses and cows, or that they would have a cash surplus coming to them. However that may be, and however unfortunate the final outcome of their transactions has proved to be, we are unable to see how we can give them any relief.

In *Wilson v. Griess*, 64 Neb. 792, cited by plaintiffs, a national bank, which held for collection a note of another bank of which it was a large stockholder, took a renewal thereof and included in the renewal note its own unsecured debt against the maker, and at the same time obtained a mortgage upon the homestead of the debtor, signed by himself and wife, to secure the new note, and we held that the assistant cashier, who was a director and stockholder of the bank, was disqualified to act as notary in taking the acknowledgment. In *Chadron Loan & Building Ass'n v. O'Linn*, 1 Neb. (Unof.) 1, we held that a mortgage upon a homestead, acknowledged by a notary who was likewise an officer and stockholder of the corporation, mortgagee, is invalid. In each of the above cases it will be observed that the notary was an officer and stockholder of the corporation named as grantee in the instrument acknowledged. We are unable to see how those cases can be considered as authority in this. In *Horbach v. Tyrrell*, 48 Neb. 514, the notary who took the acknowledgment was shown to be secretary and treasurer of the corporation, mortgagee, but it was not shown that he was a stockholder in the corporation, and we held that he was not disqualified. In *Watkins v. Youll*, 70 Neb. 81, the deed was acknowledged before one Barnum, who was acting as an agent for the purchaser

Pritchett v. Collins.

tkins; his contract being that for each quarter section ded to Watkins he should have a commission of \$50. will be seen that in that case Barnum was the active nt who made the purchase of the land for Watkins—a y different position from that occupied by Drayton, in case at bar, who had nothing whatever to do with the nging about of the sale of the land from plaintiffs to endant. The above are all of the cases cited by plain- s from this court. The cases from other courts, cited, w that in each of them the person taking the acknowl- ment, or the corporation in which he was a stockholder, s named in the instrument acknowledged as a bene- ary. Such cases are not in point.

We have not only examined the authorities cited by intiffs as shown above, but have also made an inde- dent examination ourselves, and have been unable to l a case in any court which goes to the extent of justi- ng us in holding that Mr. Drayton, under the circum- nces shown in this case, was not a competent officer take the acknowledgment of plaintiffs to their deed to endant. Upon the whole record, we are constrained hold that the judgment of the district court is right, l it is

AFFIRMED.

EDGWICK, J., not sitting.

GEORGE E. PRITCHETT, APPELLANT, V. GEORGE J. S. COL- LINS ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,801.

Issue: **CONFLICTING EVIDENCE.** In an action at law all questions of fact, depending upon conflicting evidence, are for the jury; and, unless manifestly wrong, the verdict should not be disturbed on appeal.

APPEAL from the district court for Douglas county: **WARD KENNEDY, JUDGE.** *Affirmed.*

Boyd v. Lincoln & N. W. R. Co.

George E. Pritchett, pro se.

Jefferis, Howell & Tunison, contra.

FAWCETT, J.

Action for rent of a building. Counter-claim for damages caused by a leaky roof. Verdict and judgment for defendants. Plaintiff appeals.

The only error assigned and argued in plaintiff's brief is the insufficiency of the evidence. Plaintiff concedes that there is a conflict in the oral testimony given by himself and the defendant Collins, but insists that his testimony is so strongly corroborated by undisputed facts that it should be believed as against "the story told by Collins." This argument should have been, and doubtless was, addressed to the jury. While we might have arrived at a different conclusion from that reached by the jury, had we been sitting as triers of fact, we cannot say that the verdict is manifestly wrong. In such case we should not interfere.

AFFIRMED.

SEDGWICK, J., not sitting.

WILLIAM BOYD, SR., APPELLEE, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1911. No. 16,468.

1. **Appeal: ISSUES: PLEADING.** Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal.
2. ———: **EVIDENCE: SUFFICIENCY.** The objection in this court that the verdict is not supported by the evidence will not justify a reversal, unless the failure of evidence is so manifest that all

Lincoln, between three and four miles in length. Middle creek flows through this valley in an easterly direction, entering into Salt creek near the east end of this new grade. The course of Middle creek was substantially on the south side of the new grade, but at three different points the grade interfered with the old channel, and at each of these points a new channel for the creek was cut along the south side of the grade. One of these new channels is at the east end of the grade, another near the west end, and the third is located between these two. It is the third or middle channel that is described in the petition, and is alleged to have been improperly constructed, so as to prevent the free and natural flow of the water. The plaintiff introduced evidence attempting to show the negligence and improper construction of this middle channel, and also introduced evidence tending to show that this new grade, which is several feet higher than the general level of the land, caused the damage complained of. The contention of the plaintiff in that regard was that before this grade was constructed, in seasons of high water, the general course of the water over the valley was towards the north and east, and that the slope of the land in that direction was such that the water flowed freely away from the plaintiff's land, which was located on the south side of this grade, and so the plaintiff's land was not overflowed, and that owing to the construction of this grade without openings the water was gathered on the south side thereof, which was one of the causes of the plaintiff's land being overflowed. The defendants in their briefs contend that no such cause of action is stated in the petition; that the evidence in regard to the obstruction of the water caused by the grade was wholly incompetent under the allegations of the petition, and should not have been admitted or considered. Of course, the plaintiff must prove the cause of action which he alleges. He cannot sue upon one cause of action and recover upon another not alleged.

The grades, new tracks and trackage are mentioned in

the petition, and it is alleged that the defendants "built high grades and embankments to the north and east of said premises," to the great injury and damage of the plaintiff, and that in making these improvements the defendants "performed the work in a negligent, reckless, careless and unnecessary manner," and that, "because of the dams, high grades and embankments aforesaid, the banks of said Middle creek were overflowed." All of these allegations of the petition, however, are, by language that is not at all uncertain, directly referred to the new channel which the defendants had cut for Middle creek about one-half mile below the plaintiff's premises. It is not directly alleged that the construction of the grade and tracks resulted in diverting the waters of Middle creek and causing them to be turned aside from their bed and channel, and no other injurious effect from these grades and tracks is anywhere alleged in the petition. There is no allegation in the petition that the water, before this grade was made, could escape across this land to the north and east of this grade, so that this circumstance would relieve the plaintiff's land from inundation, or that this grade in any manner prevented this water from so escaping; and, to make it certain and beyond question that the plaintiff's cause of action was the improper construction of this unnatural channel for Middle creek, it is emphatically alleged in the petition "that the said Middle creek, if allowed and permitted to occupy and flow in its natural and usual bed and channel, would not have overflowed at all in the vicinity of and on said premises, even in times of heavy rains and freshets, and would not have overflowed in the month of June, 1907, but for the wrongful acts, negligence and doings of said defendants, and the injury and damage suffered and sustained by plaintiff as hereinafter set forth was wholly on account of the negligence, carelessness and unnecessary acts and doings of said defendants in filling in, damming up and diverting the waters of said stream as aforesaid." The parties, however, have tried the case upon the issues now con-

tended for by the plaintiff. Plaintiff's first witness gave evidence as to the general conditions obtaining in the valley before and after the grade, dikes and other improvements were made, and also as to the form and construction of the improvements in general. Many objections were made to his testimony on various grounds, but we find no suggestion by defendants that the allegations of the petition were insufficient to support the widest investigation of the character of the improvements as a whole and their effect upon flood conditions existing in the valley. In similar testimony of subsequent witnesses examined by plaintiff, we find general objections. The plaintiff's son John was asked: "Tell whether the water was higher on the north and west side of the Denton cut-off than on the south and east?" and the objection interposed was: "The defendants object as wholly immaterial, and it is not a condition that could in any manner affect the flooding of his father's land below." When this question was put in a somewhat different form so as to apply specifically to a point some distance above plaintiff's land, the objection interposed was: "The defendants object as incompetent, immaterial, irrelevant, and as having no bearing upon the issues." The defendants also in their evidence went fully into the whole matter of the improvements there and the effect upon flood conditions. The case was tried as though the allegations of the petition covered the whole situation, and the objection to the petition comes now too late.

2. The principal question, then, presented in the case is as to the sufficiency of the evidence to support the verdict and judgment. The evidence in the bill of exceptions covers nearly 700 pages of typewritten matter. The plaintiff asserts in the briefs that this evidence is sufficient, and asserts that it is the duty of the defendants who challenge the sufficiency of the evidence to analyze the same and show wherein it is deficient. No attempt is made by the plaintiff to abstract or analyze the evidence or to point out those parts of the evidence which it is claimed suffi-

ciently support the verdict. The defendants have referred to some parts of the evidence which it is claimed show a proper and necessary construction of the improvements, and that the verdict is unsupported.

With such assistance, then, as we have had from the briefs, we have tried to analyze this mass of testimony to ascertain whether the judgment against the defendants is justifiable. The improvements are quite extensive and must involve a large outlay on the part of the defendants. They were in process of construction at the time of the floods in question. It is conceded that the particular new channel, described in the petition, which the defendants had constructed for the flow of Middle creek was incomplete. The old channel at this point was covered by the new grades for the tracks, and was therefore wholly obstructed. There is some conflict in the evidence as to the condition of the new channel. The defendants' engineer testified that the bed of this new channel at the west end, and where it was intended to receive the water of Middle creek, was only two feet higher than the natural bed of Middle creek at that point. Other witnesses testified that it was from four to six feet higher; and one witness, whose testimony upon that point probably is not very reliable, made the obstruction much larger. The non-expert witnesses for the plaintiff testified that the width of the new channel was not nearly as great as the width of the former channel of the creek, but they have made no measurements. The engineers of the defendants testified to the width and depth of the new channel, but they had failed to measure the width of the old channel at the point of their conjunction. The jury might find from this evidence that the natural channel of Middle creek was very much obstructed by the work of the defendants, so as to force the water from the creek and cause it to overflow the surrounding lands in large quantities. Not far from the plaintiff's land the defendants have built on the north side of the grade a dike or embankment, extending north from the grade several hundred feet, the purpose of which

was to turn the water to the south side of the grade and into the channel of Middle creek. Several witnesses testified that the effect of this was, together with the principal grade extending east and west a distance of about $3\frac{1}{2}$ miles, to confine the water on the south side of the grade, and to prevent the general flow to the north and east, as had formerly been the course of the water. There was also testimony that the water during the whole period of the flood was very much higher on the south side of the grade than it was on the north side, so much so that it forced passages through the grade, but not sufficiently to allow a free flow of water and so prevent the damage to plaintiff's land complained of. There was evidence, apparently reliable, tending to show that the flood of 1908 was of such magnitude that the whole valley, both north and south of this new grade, was covered with water from the "hills on the north to the hills on the south," and for a great distance up the stream beyond the plaintiff's land. The evidence is uncontradicted that at the lower or south end of this new grade the water was higher than it had ever been before, so much so that it flooded the station used by the defendants and the depot grounds, which had never occurred on any other occasion; but Mr. Bignell, upon whose testimony this latter point principally depends, was not able to say, when questioned upon cross-examination, that the water on the south side of the new grade was not higher than on the north side, or that the flood of the station grounds was not caused, partly at least, by this new grade which it was claimed carried the body of the water down to the vicinity of the station and prevented it escaping to the northeast below the station grounds. He shows that there were several breaks in the grade caused by the flood water, but to what extent this lowered the water on the south side of the grade, or tended to equalize the volume of water with the water on the north side of the grade, he does not attempt to say. We are not called upon to determine this question of fact *de novo*, as in equity cases. Unless the evidence is so clear and cer-

tain that all reasonable men acting upon the evidence alone must conclude that this damage was not caused by the negligence of these defendants, we cannot interfere with the verdict of the jury. Applying this rule, we have concluded with some hesitancy that the verdict of the jury is sufficiently supported.

3. The witnesses were allowed to testify as to the value of the crops destroyed. The defendants insist that the inquiries should be limited to the market value. This is undoubtedly the rule when the articles in question have a market value. Immature, growing crops cannot be said to come within that rule. *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70; *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 714; *Berard v. Atchison & N. R. Co.*, 79 Neb. 830; *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657; *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745; *Thompson v. Chicago, B. & Q. R. Co.*, 84 Neb. 482. Certain kinds of crops, if mature and capable of proof as to quantity and quality, may have a market value. The evidence does not appear to show such condition of the crops in question. We think the ruling of the court in this respect was right. While it may be difficult to ascertain the real damages sustained, the defendants cannot escape liability for that reason.

Chicago, B. & Q. R. Co. v. Mitchell, 74 Neb. 563, and *Smith v. Chicago, B. & Q. R. Co.*, 81 Neb. 186, are cited by the defendant as holding that the evidence must be limited to the market value of the crops destroyed. It does not appear from the opinion in either of these cases that the court was discussing the question here presented. In the former the question discussed was as to the sufficiency of the evidence to establish the amount of damage recovered, although the evidence is not quoted at length. The instruction given by the trial court, in which it is stated that the measure of damage is "the fair market value of the crop just before the land was flooded, in the manner above alleged, if proved, and immediately there-

Boyd v. Lincoln & N. W. R. Co.

after," is quoted, and it is said that this was the proper measure. It is, however, evident that the writer of the opinion had in mind the time to which the proof should be limited in considering the value—that is, before and after the injury complained of—and was not discussing or considering the effect to be given to the word "market" in the instruction, an effect which, as in this case, would be prejudicial to the plaintiff, and not to the party complaining of the instruction. In the latter case the point determined was that when the crop was totally destroyed the measure of damage would be the value of the crop before the injury. Here the word "market" was inadvertently used. The language used in these opinions in discussing other propositions of law was not intended to change the general rule of law in such cases.

4. It is also urged that the court erred in admitting testimony of damage to the plaintiff's pasture land. The allegations of the petition in regard to these supposed damages are somewhat indefinite. If pasturage is considered a crop, the general language of the petition may be considered sufficient for this purpose. The objection to this evidence was not on the ground of variance from the allegations of the petition. The principal witness on this matter was asked, "What was the fair and reasonable value, per acre, of this pasture land of your father's before July 5, 1908, before the flood, in the condition it was before the flood?" and the objection interposed was: "The defendants object as incompetent, and no foundation laid, and not the proper measure of damage, and the witness is not qualified." The point now urged, that the damage to the pasture is not sufficiently alleged in the petition, is not presented by this objection. The reason is stated in the objection for the assertion that the evidence called for is incompetent, and no reference is made to the supposed insufficiency of the petition. If it was intended to obtain a ruling upon that point, the trial court would be misled by the form of the objection. The case was tried by both parties upon the theory that the loss of this pasturage was one element of plaintiff's damage.

Cohn v. Butterfield.

5. The eleventh instruction given by the court is complained of. It tells the jury that they should find "the fair market value of crops damaged or destroyed," and that "the measure of damage is based on the value of the growing crops." The damages caused by injury to growing crops are measured by the difference in value in the growing crops caused by the injury, and, if the crops are totally destroyed, the measure is the value before the injury. The evidence upon this point was furnished by plaintiff's witnesses. They testified that the crops were entirely destroyed, and the defendants offered no opposing evidence. The instruction, then, is technically erroneous in requiring the jury to find the "market" value, and in suggesting that some of the crops were damaged only. In other respects the instruction is correct, and in these two particulars it is prejudicial to the plaintiff, and not to the defendants.

The judgment of the district court is

AFFIRMED.

MAX COHN, APPELLEE, V. CHARLES D. BUTTERFIELD, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,526.

- Officers: REMOVAL: RIGHT OF APPEAL.** The plaintiff and appellee began an action in the district court by petition in error against this defendant and appellant to reverse an order of the governor removing appellee from the office of notary public upon complaint of appellant, and obtained a judgment for costs against this appellant and an order reversing the decision of the governor. *Held*, That the appellant has such interest in the proceedings in the district court as to enable him to appeal from the judgment and order therein to this court.
- : —: REVIEW.** Upon petition in error in the district court to reverse an order of the governor removing a notary public from office, the plaintiff in error is not entitled to a trial *de novo* and it is error to order the reversal of the decision of the gov

Cohn v. Butterfield.

error for want of prosecution in the district court and to enter judgment for costs against the defendant in error.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Pitzer & Hayward, D. W. Livingston and Edwin Zimmerer, for appellant.

John H. Ames, F. T. Ransom and Hall, Woods & Pound, contra.

SEDGWICK, J.

Charles D. Butterfield, who is named as defendant in this case, filed a complaint before the then governor, John H. Mickey, charging Max Cohn, who is named as plaintiff and who was then a duly qualified and acting notary public, with malfeasance in office as notary public. The proceedings were brought under section 14 of the notary public act. Comp. St. 1909, ch. 61, sec. 14. The proceedings before the governor were entitled "Charles D. Butterfield v. Max Cohn." The governor appointed a referee, who took evidence and duly certified and returned the same to the governor. Mr. Cohn was duly notified, and upon consideration of the evidence and argument the governor found that the charges in the complaint were sustained, and made an order removing him from the office of notary public.

Thereafter, and on the 26th day of April, 1907, Mr. Cohn filed a petition in error in the district court for Lancaster county to reverse the order of the governor. In this petition he named himself as plaintiff in error and Mr. Butterfield as defendant in error, and alleged that Mr. Butterfield was complainant before the governor, and as such "procured an order and judgment removing this plaintiff from his said office of notary public." A summons in error was issued and served upon Mr. Butterfield as defendant in error. On the 17th day of July, 1909, his petition in error having been pending for more than

Cohn v. Butterfield.

years, and nothing having been done in the case by her party, Mr. Cohn filed a motion to "sustain the appeal in the above entitled cause of action and to reverse and set aside the findings and order of the Honorable John H. Mickey, formerly governor, and to reinstate the plaintiff in error to his official position as notary public." The ground stated in the motion for the relief asked was that the petition in error had been pending and summons in error duly served as above stated, and that "defendant in error has entered no appearance and filed no pleadings of any kind." Three days thereafter the court made an order reciting that "it appearing that the defendant in error has had due notice of said motion and he has failed to appear, the court hereby enters a default against him for his failure to appear in said cause as to said motion," and ordering that "the said appeal is sustained in the above entitled action, and the finding and order of the honorable John H. Mickey, aforesaid, is hereby reversed, set aside and held for naught, and that the plaintiff in error recover his costs herein." The defendant in error, Charles D. Butterfield, has appealed to this court.

1. The appellee presents questions to this court in the following words: "Has this court any litigable question before it? Has the appellant any legal interest in the controversy? Is he in any sense a party to the proceeding, has he been such in any of its stages? In our opinion the answer of these questions must be answered in the negative." This, plainly, is not the correct answer to these questions. The governor is authorized to appoint such number of persons to the office of notary public in each county "as he may deem necessary (Comp. St., ch. 61, sec. 1), and, when charges of malfeasance in office are brought to the attention of the governor against a notary public, he must have the evidence taken, and certain formalities must be complied with, and, if he is satisfied from the evidence that "the charges are substantially proven, the governor may remove the person charged from the office of notary public." Comp. St., ch. 61, sec. 14. This case is not in substance

the same as *Munk v. Frink*, 75 Neb. 172, 81 Neb. 631, although the proceedings may be somewhat analogous. An appointee to office has no such right therein as against the public or the appointing power as a physician has in his profession. In this country it is not unusual for the legislature to provide that the appointing power may remove the appointee at pleasure. Sometimes, as in this case, notice and a hearing with opportunity to defend are necessary. Generally no appeal is allowed unless provided for by statute. In this state no doubt a review may be had, as pointed out in *Munk v. Frink*, *supra*, and *Mathews v. Hedlund*, 82 Neb. 825, but, as said in those cases, the court will not weigh conflicting evidence to ascertain whether the order of removal is sustained. This plaintiff began proceedings in the district court against this defendant to reverse an order which he alleged this defendant had obtained against him. On his motion the court reversed the order complained of, and adjudged costs against this defendant and in favor of this plaintiff. Surely he cannot now be heard to say that defendant had no interest in that order and judgment.

2. Did the district court err in reversing the governor's order and adjudging costs against the defendant? The plaintiff was the moving party in the district court. It devolved upon him to show to the court upon the record presented that there was such error in the proceedings before the governor that the order was invalid. The court is not authorized to try the cause *de novo*, and the fact that the defendant in those proceedings had "entered no appearance and filed no pleadings" did not render the order of the governor erroneous. If the district court did not have jurisdiction of the cause for want of proper parties, the result here would be the same; a judgment against the defendant under such circumstances would be erroneous.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,707.

Railroads: CROSSINGS: POWERS OF RAILWAY COMMISSION. The power to open streets and to regulate and control railway crossings over the same in incorporated cities and villages is given by statute to the municipal authorities. The state railway commission has general jurisdiction of such matters outside of cities and villages.

State Railway Commission: POWERS. Whether the state railway commission has any duty to perform in case the proper municipal authorities wilfully refuse to act in regulating railway crossings of streets in cities and villages, or has any supervising power of such crossings to safeguard the passengers and employees on trains, is not involved in this case, and is not decided.

Former decision adhered to.

OPINION on motion for rehearing of case reported in 88 b. 239. *Rehearing denied.*

SEDGWICK, J.

It was held in the opinion in 88 Neb. 239, that the village authorities have exclusive original jurisdiction of the matters determined in this case, and that the action of the state railway commission was therefore without jurisdiction. The statement of law in the syllabus is conceded in the brief upon the motion for rehearing to be correct, if a street has been laid out or ordered to be opened. The attention seems to be that the proceedings of the village authorities opening the street were found by the railway commission to be regular and valid, and in such case the commission has jurisdiction. It is, however, admitted that the only defense of the railway company was with reference to the validity of those proceedings. The pleadings and evidence and rulings before the commission and in court upon appeal all show that the sole question in dis-

pute is whether the public road in question is necessary and ought to be opened. This is a question for the village authorities under subdivisions XXI, XXVII, sec. 69, art. I, ch. 14, Comp. St. 1909.

If those provisions of statute are constitutional; and the village authorities have proceeded regularly and ordered the street opened over the right of way and tracks of the company, and a proper crossing constructed, the courts will enforce such order, as they will the orders of the railway commission in matters within its jurisdiction. The village is not required to wait for the approval of the railway commission, but is entitled to immediate obedience of its proper order in that regard. If the railway commission can review and approve the findings and orders of the village authorities, it can, of course, also annul them, and, both being administrative bodies, the right to open and control the streets and regulate railroad crossings within the village would thereby be taken away from the local authority and conferred upon the state commission, which is contrary to the plain letter of the statute.

The railway commission is given jurisdiction of railway crossings in general outside of cities and villages, but we do not want to be understood as holding that it has authority to inspect crossings within cities and villages, with a view to safeguard the lives of passengers and employees upon its cars, or for any other purpose, for no such question is presented by this record. And it must not be inferred from any language used in the former opinion that, in supervising crossings outside of cities and villages, the commission is under less obligation to safeguard the public who use such crossings than it is to protect those who are carried in its trains.

Our former decision reversing the judgment of the district court and dismissing the proceedings before the railway commission is adhered to. Motion for rehearing

OVERRULED.

RENSH, C. J., dissenting.

If the commission has jurisdiction over the subject matter, its authority, although in a sense advisory only, could be upheld. It is contended that the village board has jurisdiction and authority to order the track to be linked between and on the outer side of the rails, so as to render the way passable and safe, and, in case of a refusal on the part of the railroad company to comply with the order, an action in the form of mandamus could be instituted by the village authorities in the district court. Thereby the duty could be coerced, and that that right should not be taken away. To this I fully agree. The doors of the courts are and must be open at all times for the enforcement of the performance of the duties imposed. It may be conceded that that would be the better and more effective course to be pursued, for there are many arguments in its favor. While all this may be conceded, yet it does not follow that the commission, to the extent of its powers, may not have concurrent jurisdiction over the same subject matter, but based upon a rather different foundation. The constitution (amendment, 1906) provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law." By section 2, art. VIII, ch. 72, Comp. St. 1909, the commission is given power to regulate the rates and services of, and to exercise a general control over, all railroads; to examine and inspect, from time to time, the condition of each railway or common carrier, its equipment, and the manner of its conduct and management, with regard to the public safety and convenience in the state; and, if any part thereof is found in an unsafe and dangerous condition, said commission shall immediately notify the railway company whose duty it is to put the same in repair, which shall be done by it within a reasonable time after receiving such notice, etc. The duty of making and keeping a crossing in repair is imposed upon railroads by section 110, ch. 78, Comp. St.

1909. This section has been held valid in numerous cases, among which are *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412; *Burlington & M. R. R. Co. v. Koonce*, 34 Neb. 479; *Missouri P. R. Co. v. Cass County*, 76 Neb. 396. By these provisions, and others, in the statutes, it is clear that the commission has a control, oversight and superintendency over all railroads within the state, "with regard to the public safety and convenience in the state," and for that purpose must, of necessity, have jurisdiction over every foot of railroad track in the state, without reference to whether the track is located within an incorporated village or city or in the open country. Wherever "the public safety and convenience" is overlooked or ignored by a railroad company in the condition of its tracks, the commission has the power, and it is its duty, upon complaint being made, to order the repair or correction. Should the authorities of a city or village fail or refuse to require the tracks to be rendered safe and convenient for the use of the public, the authority of the commission cannot thereby be ousted, and the people be left to shift for themselves, and be compelled to seek other means and places of crossing the tracks. It is manifest that they would not be permitted to enter the right of way of a railroad company and plank crossings in order to render the way passable. The safety of the traveling public, as well as of the railroad company itself, requires that the duty of making grade surface crossings safe and convenient must be with the railroad company.

The bill of exceptions shows beyond any question that Walnut street from the east to the west lines of the corporation is, and has been, open since the settlement of the village, the only obstruction being the railroad crossing; that on either side of the railroad track residences are established, and sidewalks have been constructed in front of the lots fronting on Walnut street to near the right of way of the railroad company; that the school house and some residences are located on the east side of the track, and the major portion of the residences and the

Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission.

the church on the west side; that there are two street crossings in the village, both of which are frequently blocked by standing of freight trains; that at the point where the crossing is desired, and evidently needed, the road track is in a cut from 2 to 2½ feet deep; that the towns and village authorities have stood ready to do the crossing at their own expense, and the fact is stipulated in the record. The contention of the railroad company that the street in question has never been legally opened is a mere pretense, and entitled to no consideration. Without discussing the evidence at length, I am unable to see any reason why the crossing should not be made, but why it should, and that without further delay. It appears that the safety and convenience of the public, of which the citizens of Hallam form a part, require that the road track be improved as ordered by the railway commission. In my opinion, the decision of the district court dismissing the appeal was right, and should be affirmed.

SEN and FAWCETT, JJ., concur in this dissent.

INDEX.

Abandonment.

Failure to place deed on record and pay taxes held not an abandonment of lands. *Tate v. Biggs*..... 195

Acknowledgment.

A notary held not disqualified to take an acknowledgment. *Mudra v. Groeling* 829

Action.

Where plaintiff has stated a valid cause of action for damages, his motive in bringing suit is immaterial. *Flinn v. Fredrickson* 563

Adultery. See HUSBAND AND WIFE, 3.

Adverse Possession. See LIFE ESTATES, 2. TENANCY IN COMMON.

1. Possession by permission will not become adverse until some act is done rendering it so, and notice thereof is given to owner of legal title. *Blake v. West*..... 794
2. One who enters upon real estate under an oral contract to purchase cannot obtain title by adverse possession without showing that his occupancy had been adverse during the statutory period. *Blake v. West*..... 794

Affidavits. See TAXATION, 1.

An affidavit sworn to before a person not authorized to administer oaths is void. *Lanning v. Haases*..... 19

Appeal and Error. See CONTEMPT. CRIMINAL LAW. DRAINS, 1. EJECTMENT, 4. INSURANCE, 5, 6, 8, 14. JUSTICE OF THE PEACE, 2, 3. OFFICERS, 2. TRIAL. WITNESSES, 2.

1. A party against whom no judgment has been rendered, or whose rights are not affected by the judgment, cannot appeal. *Swallow v. Eureka Mfg. Co.*..... 467
2. No appeal is allowed from findings of facts or conclusions of law. *First Nat. Bank v. Cooper*..... 632
3. Appellant held to have such an interest in proceedings in district court as to enable him to appeal from the judgment. *Cohn v. Butterfield*..... 849
4. Proof held not a material variance from an allegation, under sec. 145 of the code. *Hawkins v. Collins*..... 140

Appeal and Error—Continued.

5. Error cannot be predicated on the admission of testimony identical with that already admitted without objection. *Larson v. Chicago & N. W. R. Co.*..... 247
6. The admission of incompetent evidence *held* not reversible error in a case tried to the court, where the judgment is sustained by other evidence. *Ætna Indemnity Co. v. Malone*, 260
7. Appellant cannot predicate error on the admission of incompetent testimony to which he made no objection. *Harrington v. Hedlund* 272
8. Where plaintiff is entitled to judgment on the evidence, a verdict and judgment for defendant will be reversed. *Cannell v. Roush* 289
9. The receipt or rejection of collateral evidence is largely within the discretion of the trial court. *Barry v. Anderson*, 332
10. A finding on conflicting evidence is conclusive unless manifestly wrong. *First Nat. Bank v. Golder*..... 377
11. Findings of the trial court in a law action supported by competent evidence will not be set aside unless clearly wrong. *Howell v. Bowman*..... 389
12. The rule that a court will not be presumed to have based his decision upon incompetent evidence where there is sufficient competent evidence applies to the findings of a referee. *In re Estate of Holloway*..... 403
13. A verdict on conflicting evidence will not be disturbed unless clearly wrong. *Flinn v. Fredrickson*..... 563
Bradstreet v. Grand Island Banking Co...... 590
Clark Implement Co. v. Jay..... 759
14. In action for death of husband, evidence that plaintiff had no other means of support than the earnings of her husband *held* not to require reversal of judgment. *Gundy v. Nye-Schneider-Fowler Co.* 599
15. A judgment will not be reversed for immaterial variance between allegation and proof. *Fitzgerald v. Young*..... 693
16. Where oral testimony is so at variance with the undisputed facts and circumstances as to render it unworthy of belief, the verdict will be set aside. *Heink v. Lewis*..... 705
17. Finding of jury on controverted fact will not be set aside unless clearly wrong. *Blado v. Draper*..... 787
18. A finding on conflicting evidence that real estate was not appraised too low will not be disturbed. *Stephenson v. Murdock* 818
19. A finding on conflicting evidence that appraisers appraised the property described in the decree will be sustained if

Appeal and Error—Continued.

- the evidence preponderates in its favor. *Stephenson v. Murdock* 818
20. A verdict on conflicting evidence will not be disturbed unless manifestly wrong. *Pritchett v. Collins*..... 839
21. Unless the failure of evidence is so manifest that all reasonable men must agree that it is insufficient to sustain the verdict, a reversal will not be granted. *Boyd v. Lincoln & N. W. R. Co.*..... 840
22. Judgment on a directed verdict affirmed, under sec. 145 of the code, where no prejudice was shown, nor a substantial defense. *Davison v. Land*..... 58
23. Where a defeated litigant does not request a more detailed statement of the issues, he cannot complain that the issues were not sufficiently stated to the jury. *Larson v. Chicago & N. W. R. Co.*..... 247
24. A judgment will not be reversed because one clause in an instruction is erroneous, unless the error prejudiced the complaining party. *Larson v. Chicago & N. W. R. Co.*..... 247
25. It is error to deliver the pleadings to the jury with a written instruction that they constitute the issues in the case. *Larson v. Chicago & N. W. R. Co.*..... 247
26. It is the duty of counsel to point out with reasonable particularity alleged error in instructions. *Brucker v. Kairn*.. 274
27. A defense that a note was not delivered is unavailing, where defendant failed to except to an instruction that delivery was proved. *First Nat. Bank v. Golder*..... 377
28. Complainant cannot predicate error on failure of the court to state the issues to the jury, without a request therefor and an exception to a refusal. *Morgenstern v. Insurance Co.* 459
29. If criticism of an instruction is based on particular testimony, the testimony should be specifically pointed out in the brief. *Fitzgerald v. Young*..... 693
30. Where the trial court on a second trial gave an instruction requested by defendant on the first trial, and approved by the supreme court, he cannot complain. *Struble v. Village of DeWitt* 726
31. An instruction that the market value of crops destroyed is the measure of damages, though erroneous, held not prejudicial. *Boyd v. Lincoln & N. W. R. Co.*..... 840
32. Where the record presents only a moot question, the appeal will be dismissed or the judgment affirmed. *Deines v. Schwind* 122

Appeal and Error—Concluded.

33. The supreme court will not consider on appeal issues not tendered by the pleadings. *Mauzy v. Hinrichs*..... 280
34. Parties as a rule will be restricted on appeal to the theory upon which the cause was tried. *Mauzy v. Hinrichs*..... 280
35. Where a motion for a new trial is not filed within three days after verdict, the supreme court will only consider whether the pleadings sustain the judgment. *Summers v. Chisholm* 324
36. On appeal, the supreme court will disregard error not affecting substantial rights. *Swanson v. Union Stock Yards Co.* 361
37. An order striking a paragraph from an answer is not erroneous, where the matter is pleaded in other parts of the answer. *First Nat. Bank v. Golder*..... 377
38. Prejudice from amendment of pleadings at trial will not be presumed, but it must be made to appear. *Gundy v. Nye-Schneider-Fowler Co.* 599
39. Appellant cannot predicate error on a ruling in his own favor. *Fitzgerald v. Young* 693
40. Where an issue was tried without objection that it was not sufficiently pleaded, the objection will not be considered on appeal. *Boyd v. Lincoln & N. W. R. Co.*..... 840
41. The supreme court will not consider a document purporting to be a bill of exceptions when not authenticated. *State Bank v. Bradstreet* 186
Bill v. Swift 437
42. Affidavits in support of motion for new trial cannot be considered, unless made a part of the bill of exceptions. *Fitzgerald v. Young* 693

Appearance.

1. One who by motion or otherwise invokes the powers of the court, except on the question of jurisdiction, appears generally. *Lillie v. Modern Woodmen of America*..... 1
2. An appearance for the purpose of objecting to the jurisdiction of the subject matter of the action is a waiver of all objections to jurisdiction over the person. *Lillie v. Modern Woodmen of America* 1

Assault and Battery.

1. A person unlawfully assaulted held not liable in damages for injuries to his assailant. *Hoover v. De Klotz*..... 146
2. Where justification is the only defense to an action for assault, and the evidence is insufficient, the trial court should direct a verdict for plaintiff. *Flinn v. Fredrickson*, 563

Attachment. See ATTORNEY AND CLIENT, 1-4.

1. An attachment debtor, by executing a bill of sale of the attached goods to the attachment creditor, thereby ratifies the attachment, and cannot thereafter sue on the attachment bond for damages for unlawful attachment. *Eiseley v. Norfolk Nat. Bank*..... 382
2. In an action for unlawful attachment, evidence held to authorize direction of a verdict for defendant. *Eiseley v. Norfolk Nat. Bank* 382

Attorney and Client. See EXECUTORS AND ADMINISTRATORS, 5, 6.
HUSBAND AND WIFE, 1. INFANTS, 3. PARTITION. WILLS, 6, 7.

1. An attorney's lien, filed in a pending action, binds realty previously attached therein to satisfy the client's claim. *Zentmire v. Brailey*..... 158
2. Plaintiff, by dismissing his action in fraud of his attorney's rights, cannot thereby prevent enforcement of the attorney's lien on property attached to satisfy plaintiff's claim. *Zentmire v. Brailey*..... 158
3. A nonresident defendant whose realty has been attached held chargeable with notice of a lien of plaintiff's attorney. *Zentmire v. Brailey*..... 158
4. Where a nonresident defendant's realty has been attached, notice to vacate a dismissal procured in fraud of the attorney's rights under a lien may be served on counsel who appeared for defendant. *Zentmire v. Brailey*..... 158
5. An attorney at law has a charging lien upon money in the hands of an adverse party in an action or proceeding. *Gordon v. Hennings*..... 252
6. An attorney, while the relation of attorney and client exists, has authority to collect money due his client in an action in which he rightfully appears. *Gordon v. Hennings*..... 252
7. Statement of extent of lien of attorney on certain city warrants for services and money expended. *Gordon v. Hennings* 252
8. Where an attorney receives a mortgage for \$1,215 and a note for \$285 in settlement of a will contest, and he takes the note as full compensation for his services, he cannot maintain a suit in his own name to foreclose the mortgage; he having no interest therein. *Everson v. Hurn*..... 716
9. Where the wife's attorney is made corespondent in a divorce suit, it is against the ethics of the profession for him to act both as attorney and witness for the wife. *Wilson v. Wilson*..... 749

Automobiles. See DAMAGES, 8. DEATH, 4. EVIDENCE, 10. HIGHWAYS, 3. HOMICIDE, 1-6. NEGLIGENCE, 3, 4.

Bailment.

The selection of a carrier and delivery of diploma of applicant for license to practice medicine to it for return to the applicant *held* not actionable negligence rendering secretaries of the board of health personally liable for loss of the diploma in transmission. *Whiteside v. Adams Express Co.* 430

Bigamy.

Intent not being an element of the crime of bigamy under sec. 201 of the criminal code, it is no defense for accused to prove he acted in good faith on advice of counsel that a former marriage was void. *Staley v. State*..... 701

Bills and Notes. See APPEAL AND ERROR, 27.

1. To avoid the defense of usury in a note, one must prove that he is a *bona fide* purchaser for value, before maturity, and without notice. *Bolen v. Wright*..... 116
2. Petition *held* sufficient to sustain a judgment reforming notes. *Strauss v. Monitor Specialty Co.*..... 176
3. Evidence *held* to sustain allegations of petition and judgment reforming notes. *Strauss v. Monitor Specialty Co.*... 176
4. A telegram *held* an unconditional acceptance of a draft. *State Bank v. Bradstreet*..... 186
5. A consideration moving to one of several joint makers of a note is good as to all. *First Nat. Bank v. Golder*..... 377

Bonds. See DAMAGES, 2. ESTOPPEL, 1.

Boundaries. See FENCES.

Brokers.

1. Where a purchaser of land caused a part of the consideration to be conveyed to the agent as commission, *held* that he could not recover the property from the agent. *Latson v. Buck* 28
2. In a suit to recover land from a broker, evidence *held* insufficient to establish the relation of principal and agent, or fraud entitling plaintiff to relief. *Latson v. Buck*..... 28
3. A broker, under an agreement giving him all above a fixed amount as commission, may fix the price for which he will sell land. *Latson v. Buck*..... 28
4. Owner employing broker to exchange property *held* estopped to deny that the broker's assistance was the proximate cause of an exchange. *Cannell v. Roush*..... 289

tempting to board a moving street car is ce held a question for the jury. <i>Nocito Street R. Co.</i>	209
test of negligence is the ordinary usage ot to apply to negligence arising from a [a street car by which a passenger was . <i>Omaha & C. B. Street R. Co.</i>	209
delivery of goods to the consignee against use, except the act of God or the public id <i>Bros. Co. v. Chicago, B. & Q. R. Co.</i> ...	660
lays shipment of goods or negligently fails om threatened danger, and they are dam- God, and such negligence or delay is the f the injury, the carrier is liable. <i>Sunder- Chicago, B. & Q. R. Co.</i>	660
efficient to sustain judgment for excessive underland <i>Bros. Co. v. Chicago, B. & Q.</i>	660
of mortgaged chattels without cause can- ler a clause authorizing mortgagee to take 'should feel unsafe or insecure." <i>Flinn</i>	563
e quality of goods shipped is lost, stated.	299
.....	306
ginal package as governed by interstate ed. <i>In re Agnew</i>	306
e PARDON, 2. TAXATION, 10. dinarily substitute their judgment as to of the rate of speed at which motor wfully driven for that of the legislature.	34
providing a system of pensions for city violative of sec. 7, art. IX of the constitu- ce.....	149
roviding pensions for city firemen, held ec. 3, art. XII of the constitution. <i>State</i>	149
i, providing pensions for city firemen, vene sec. 16, art. III of the constitution.	149

Constitutional Law—Concluded.

5. An act providing that certain foods sold in package form, not put up by a retailer, shall bear label showing net weight or measure of contents *held* not to deprive one of the equal protection of the law in violation of the fourteenth amendment to the United States constitution. *Freadrich v. State*, 343
6. An amendment to the constitution becomes a part thereof and is applicable to subsequent transactions. *State v. Furse*, 652

Contempt.

1. On a trial to the court without a jury, the court's action in admitting evidence will not be reviewed. *Kemmerling v. State* 98
2. Evidence *held* to support conviction for contempt of court. *Kemmerling v. State*..... 98

Continuance.

- Denial of a continuance *held* within the discretion of the trial court. *Harrington v. Hedlund*..... 272

Contracts. See DAMAGES, 1, 2. INFANTS, 1. MASTER AND SERVANT, 7. VENDOR AND PURCHASER, 1.

1. A subcontractor using material of the contractor *held* liable for the price previously fixed therefor. *McGowan v. Gate City Malt Co.*..... 10
2. Contractor *held* liable for extras ordered by his superintendent and furnished by a subcontractor without a written agreement therefor as provided in his contract. *McGowan v. Gate City Malt Co.*..... 10
3. "Employees upon the job" *held* not to include superintendents within the meaning of a building contract. *McGowan v. Gate City Malt Co.*..... 10
4. Certain acts *held* to complete a contract. *Lamoreaux & Peterson v. Phelan, Shirley & Callahan*..... 47
5. To release one from an offer to contract on the ground of mistake, the fact concerning which the mistake was made must be material. *Lamoreaux & Peterson v. Phelan, Shirley & Callahan*..... 47
6. Certain facts *held* not to constitute a mutual mistake. *Lamoreaux & Peterson v. Phelan, Shirley & Callahan*..... 47
7. Evidence *held* not to relieve one from an offer to contract on the ground of mistake. *Lamoreaux & Peterson v. Phelan, Shirley & Callahan*..... 47
8. Certain facts held an unconditional acceptance of an offer to contract. *Lamoreaux & Peterson v. Phelan, Shirley & Callahan* 47

Contracts—Concluded.

9. In an action on a contract, plaintiff must allege that it was executed by, or is the obligation of, defendant, where it purports to be the personal obligation of another. *Witt v. Old Line Bankers Life Ins. Co.*..... 163
10. In an action on a conditional contract for payment of money, plaintiff must comply with sec. 128 of the code by alleging due performance of conditions, or he must allege facts showing such performance. *Witt v. Old Line Bankers Life Ins. Co.*..... 163
11. A contract for the purchase of a business consisting in part of slot machines used for gambling held illegal, and, while executory, money paid thereon may be recovered back. *Muller v. Stoecker Cigar Co.*..... 438
12. A consideration does not necessarily consist of a direct advantage to the promisor, but may consist of a direct disadvantage to the promisee. *Southern Realty Co. v. Hannon.* 302
13. Where defendant had reason to believe that plaintiff understood a stipulation in a certain way, the sense in which plaintiff understood it must prevail, under sec. 341 of the code. *Southern Realty Co. v. Hannon.*..... 302

Corporations.

1. A person transacting business for many years with an organization as a corporation, in enforcing a demand against it, cannot question its corporate capacity. *Omaha Cattle Loan Co. v. Shelly.*..... 502
2. Under sec. 136, ch. 16, Comp. St. 1891, the liability of stockholders on default of the corporation held limited to their unpaid subscriptions to capital stock, together with the amount of capital stock owned by them. *First Nat. Bank v. Cooper.*..... 632
3. In a suit to determine the liability of stockholders for obligations which accrued before the amendment of 1891 to sec. 136, ch. 16, Comp. St. 1889, a finding that the stockholders were jointly and severally liable for the full amount of such obligations, and a judgment for a greater amount than the amended statute allowed, held erroneous. *First Nat. Bank v. Cooper.*..... 632

Counties and County Officers.

1. The county board can deduct from a judgment against the county delinquent personal taxes due from the claimant prior to an assignment of the judgment. *State v. Holt County* 445
2. Sec. 4468, Ann. St. 1909, held not to prevent a county board from deducting unpaid personal taxes from a judgment ren-

Counties and County Officers—Concluded.

dered in the district court on a claim rejected by the board.

State v. Holt County..... 445

3. Sheriff, in county having 16,000 to 20,000 population, held entitled to extra compensation for performance of duties as jailer. *Dunkel v. Hall County*..... 585

4. Sheriff, in county having 16,000 to 20,000 population, who has duties of jailer performed by deputy, held not entitled to fees for services as jailer provided in sec. 5, ch. 28, Comp. St. 1907. *Dunkel v. Hall County*..... 585

Courts. See INJUNCTION, 5. INSANE PERSONS, 1, 4, 5.

Where, on granting a divorce, the custody of a minor child is given the mother, the husband to pay a fixed sum for its maintenance, the probate court has no authority to increase the amount fixed by the district court. *In re Estate of Rusch* 265

Creditors' Suit. See LIMITATION OF ACTIONS, 3.

1. In a creditor's suit to subject property to satisfaction of a judgment against a third person, defendant, if not a party to the judgment, may establish any defense which the judgment debtor might have interposed. *Omaha Cattle Loan Co. v. Shelly*..... 502
2. Where a judgment creditor has exhausted his legal remedies, equity will aid him in subjecting the interest of an insolvent debtor in a corporation to satisfaction of his judgment. *Fuchs v. Chambers*..... 538
3. In a creditor's suit, evidence held not to sustain decree for plaintiffs. *Fuchs v. Chambers*..... 538

Criminal Law. See BIGAMY. CONSTITUTIONAL LAW, 1. EMBEZZLEMENT. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. PARDON.

1. It is not error to refuse an instruction the substance of which has been given. *Schultz v. State*..... 34
2. Where there was no evidence to support a requested instruction, held proper to refuse it. *Schultz v. State*..... 34
3. A general exception to a charge is unavailing unless the entire charge is erroneous. *Goff v. State*..... 287
4. An instruction given as requested by accused, though erroneous, held not ground for reversal. *Coffman v. State*.. 313
5. The giving of an instruction by the court similar to one given at request of accused, though erroneous, held not ground for reversal unless clearly prejudicial. *Coffman v. State* 313

Criminal Law--Concluded.

6. Admission of evidence not prejudicial to accused is not ground for reversal. *Staley v. State*..... 701
 7. Reception of incompetent evidence of a fact is not prejudicial where the fact is established by competent evidence. *Ainlay v. State*..... 721
 8. Cross-examination of hostile witness held to be within the discretion of the trial court, where no abuse of discretion is shown. *Ainlay v. State*..... 721
 9. In a prosecution for gambling, a conviction will not be disturbed where the evidence sustains it, though it is contradicted by the accused. *Ainlay v. State*..... 721
 10. Error in admission of evidence offered by the state which was not prejudicial will not require reversal of conviction. *Clarence v. State*..... 762
 11. A motion for change of venue is addressed to the discretion of the court. *Clarence v. State*..... 762
 12. Where one charged with murder in the first degree was convicted of murder in the second degree, and the conviction was reversed, held not error for the court on a second trial to refuse to require the state to try him for manslaughter only. *Clarence v. State*..... 762
- ops.** See APPEAL AND ERROR, 31. DAMAGES, 10, 11.
- damages.** See APPEAL AND ERROR, 14, 31. ASSAULT AND BATTERY, 1. DEATH, 1, 2. TRIAL, 18.
1. Ordinarily a sum of money to be paid for the nonperformance of a contract is a penalty covering damages sustained from a breach of the contract. *Haffke v. Coffin*..... 134
 2. In an action on a bond of indemnity, plaintiff must plead and prove the amount of damages. *Haffke v. Coffin*..... 134
 3. In an action against an express company for loss of a medical diploma, held that an instruction authorizing nominal damages, though erroneous, was not prejudicial. *Whiteside v. Adams Express Co.*..... 430
 4. Where mental anguish, personal injuries and physical suffering are considered, the amount of recovery must be left to the jury. *Flinn v. Fredrickson*..... 563
 5. Where the evidence is conflicting as to whether physical conditions existing some time after a personal injury were caused by such injury, the question should be submitted to the jury. *Struble v. Village of DeWitt*..... 726
 6. In an action for personal injury by a married woman accustomed to compensation for work performed for others, held not error to charge that she may recover for medical services. *Struble v. Village of DeWitt*..... 726

Damages—Concluded.

7. Evidence *held* to support verdict for \$25 for medical services. *Struble v. Village of DeWitt*..... 726
8. Verdict for \$4,500 for death by automobile *held* not excessive. *Smith v. Coon*..... 776
9. Judgment for \$2,000 for personal injuries *held* not excessive. *Blado v. Draper*..... 787
10. Immature, growing crops not having a market value, the reasonable value determines the damages caused by an injury thereto. *Boyd v. Lincoln & N. W. R. Co.*..... 840
11. The measure of damages for growing crops totally destroyed is their reasonable value before the injury. *Boyd v. Lincoln & N. W. R. Co.*..... 840

Death. See APPEAL AND ERROR, 14. DAMAGES, 8.

1. In an action for death of husband, recovery of \$5,000 *held* excessive. *Swanson v. Union Stock Yards Co.*..... 361
2. In an action for death of husband, the measure of damages is the pecuniary loss to plaintiff; her financial condition being immaterial. *Gundy v. Nye-Schneider-Fowler Co.*..... 599
3. Money recovered by an administrator under secs. 1, 2, ch. 21, Comp. St. 1909, *held* properly distributed between the widow and mother of decedent. *In re Estate of Griffin*.... 733
4. In action for death caused by automobile at street crossing, evidence *held* to sustain verdict for plaintiff. *Smith v. Coon*..... 776

Deeds.

1. Deed from grantor to her sister *held* procured by undue influence of grantee. *Miller v. Worth*..... 75
2. A deed procured by undue influence as a gift from a person who is weak mentally *held* not validated by ratification. *Miller v. Worth*..... 75
3. No presumption arises against the validity of a conveyance from a parent to a child from the mere fact of that relation. *Winslow v. Winslow*..... 189
4. The presumption is against the validity of a deed from an aged parent to one of several children. *Winslow v. Winslow* 189
5. Evidence *held* insufficient to overcome presumption against validity of deed from mother to son. *Winslow v. Winslow*, 189
6. A grantor *held* competent to execute a deed. *Hacker v. Hoover* 317
7. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Hacker v. Hoover*..... 317

Deeds—Concluded.

8. Evidence held to show that a grantor was competent to execute a deed. *Hacker v. Hoover*..... 317
9. Evidence held to support decree canceling deeds as procured by undue influence. *Bosley v. Laverick*..... 416

Descent and Distribution. See DEATH, 3.

1. Under sec. 29, ch. 23, Comp. St. 1887, lands of which a married woman died seized descended to her surviving husband as tenant by curtesy, subject to sale for her debts. *Miller v. Hanna*..... 224
2. The interest of a vendee in possession of school lands under a contract of purchase descends to his heirs, and not to his administrator. *Mauzy v. Hinrichs*..... 280

Divorce. See COURTS. HUSBAND AND WIFE, 1.

1. Unjustifiable conduct which destroys the objects of matrimony may constitute extreme cruelty. *Miller v. Miller*.... 239
2. That a husband and wife are living apart when false charges of adultery are wantonly made by one against the other does not of itself prevent such charges from constituting extreme cruelty. *Miller v. Miller*..... 239
3. The fact of separation held relevant in determining whether false charges of adultery caused great mental suffering. *Miller v. Miller*..... 239
4. The district court has discretionary power during the term to open a decree of divorce and allow further evidence. *Howell v. Howell*..... 243
5. Evidence held not to support findings that defendant was guilty of extreme cruelty. *Howell v. Howell*..... 243
6. In a suit for divorce from bed and board and maintenance, for extreme cruelty, evidence held to support decree dismissing plaintiff's petition. *Goodson v. Goodson*..... 452
7. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets. *Anderson v. Anderson*..... 570
8. Promise of forgiveness, to constitute condonation, must be followed by a restoration of the offending party to all marital rights. *Anderson v. Anderson*..... 570
9. Evidence held insufficient to establish condonation of cruelty. *Anderson v. Anderson*..... 570
10. Insanity, to be available as a defense, must be pleaded. *Anderson v. Anderson*..... 570
11. Evidence held to support decree of divorce for extreme cruelty. *Anderson v. Anderson*..... 570

Divorce—Concluded.

12. Evidence *held* to sustain decree for alimony. *Anderson v. Anderson*..... 570
13. Where both parties to a divorce suit are found guilty of any of the enumerated offenses for which a divorce may be granted, the suit will be dismissed. *Wilson v. Wilson*.. 749

Drains. See HIGHWAYS, 4. WATERS, 1-8.

1. On appeal from the assessment of benefits to land in a drainage district, *held* not reversible error to charge that the burden of proof is on the district to show that the lands assessed will be benefited. *Drainage District v. Bowker*.. 230
2. Under ch. 161, laws 1905, prior to amendments of 1909 (laws 1909, ch. 147), *held* not reversible error to submit to a jury the amount of benefits to land in a drainage district. *Drainage District v. Bowker*..... 230

Ejectment.

1. Under a general denial in ejectment, defendant may show that a deed in plaintiff's chain of title was a forgery. *Martin v. Harvey*..... 173
2. Under a general denial in ejectment, defendant may prove any fact which will defeat plaintiff's action. *Martin v. Harvey* 173
3. In an action in ejectment, evidence *held* to sustain a finding that a deed in plaintiff's chain of title was a forgery. *Martin v. Harvey*..... 173
4. Where, in ejectment, the evidence is conflicting as to the location of a government corner and as to adverse possession, the verdict will not be set aside. *Harse v. Ramer* 680

Elections. See SCHOOLS AND SCHOOL DISTRICTS.

1. A ballot, though marked in a peculiar manner, should be counted in accordance with the voter's intent, if ascertainable. *White v. Slama*..... 65
2. An irregularly marked ballot will not be presumed so marked to identify the elector. *White v. Slama*..... 65
3. A ballot marked with a line or lines within a party circle should be counted, where there is no evidence that they were traced to identify the ballot. *White v. Slama*..... 65
4. A ballot marked with a well-defined cross within a party circle should not be rejected because of marks without that circle, where the intent of the elector is manifest. *White v. Slama*..... 65
5. Where no more ballots are cast than the number of electors voting, a regularly marked ballot found upon a re-

Elections—Concluded.

- count in an envelope marked "rejected" should be counted.
White v. Slama..... 65
6. Certain facts *held* insufficient to show that a person voting at an election was a resident within sec. 1, art. VII of the constitution. *White v. Slama*..... 65
7. Circumstantial evidence *held* competent to prove which of two candidates received the benefit of illegal votes cast. *White v. Slama*..... 65

Embezzlement.

1. A guardian who converts the estate of his ward to his own use is guilty of embezzlement under sec. 121 of the criminal code, though he has not made final settlement. *Edmondson v. State*..... 797
2. Voluntary admissions of a guardian are admissible in evidence against him. *Edmondson v. State*..... 797
3. Under an information charging a guardian with having embezzled a certain amount of his ward's money, proof that he has converted any money to his own use will sustain the charge. *Edmondson v. State*..... 797
4. That a guardian would be entitled to a small portion of money converted for his services is not a defense to a prosecution for embezzlement. *Edmondson v. State*..... 797

Eminent Domain.

Where there are no unpaid claims against the estate, a devisee has right to condemnation money of land of decedent as against a foreign executor not in possession. *McManus v. Burrows*. 250

Equity. See INJUNCTION, 1. INSANE PERSONS, 4, 6. QUIETING TITLE, 6. TRUSTS. USURY, 2.

Equity will endeavor to carry out the real intent and purpose of parties to a contract. *Fenton v. Tri-State Land Co.*..... 479

Estoppel. See BROKERS, 4. QUIETING TITLE, 4. TAXATION, 11. TRUSTS, 5. VENDOR AND PURCHASER, 8.

1. A recital in an indemnity bond to secure performance of a contract for exchange of land for personal property, that the chattels are of an agreed value, does not estop either party from proving their actual value. *Haffke v. Coffin*.... 134
2. Estoppel to be available as a defense must be pleaded. *Muller v. Stoecker Cigar Co.*..... 438

Evidence. See APPEAL AND ERROR, 4-21. BILLS AND NOTES, 1. CONTRACTS, 4, 6-8. CRIMINAL LAW, 6-10. DEEDS, 8, 9. DIVORCE, 3, 5, 6, 9, 11, 12. EJECTMENT. ELECTIONS, 7. EM-

Evidence—Concluded.

BEZZLEMENT, 2, 3. HUSBAND AND WIFE, 3. INSURANCE, 5-14.
 LARCENY, 1, 2. LIBEL AND SLANDER, 2, 4, 6-8. TAXATION, 5,
 6. TRIAL. TRUSTS, 7, 8. WITNESSES.

1. In an action on a benefit certificate, where certain letters written by plaintiff were introduced by defendant, the meaning of which was ambiguous, *held* not error to permit plaintiff to explain the circumstances and the language used. *Lillie v. Modern Woodmen of America*..... 1
2. A transcript of the record of conviction of the beneficiary *held* not admissible, in an action on the benefit certificate, as substantive evidence of the facts upon which the prosecution was founded, nor of the fact of the murder of the assured by the beneficiary. *Lillie v. Modern Woodmen of America* 1
3. Entries in docket of police judge *held* ordinarily conclusive in an action against him for charging excessive fees. *Downey v. Coykendall*..... 21
4. Owner *held prima facie* qualified to testify to the value of his property. *Hawkins v. Collins*..... 140
5. In an action against an express company for loss of a medical diploma, letter of attorney for defendant to the college issuing the diploma for a duplicate copy *held* properly excluded. *Whiteside v. Adams Express Co*..... 430
6. In an action on a life policy, where a written statement of decedent is offered as part of the *res gestæ*, *held* not an abuse of discretion to require proof that the statement or the signature thereto is in decedent's handwriting before admitting it in evidence. *Walden v. Bankers Life Ass'n*.. 546
7. Foundation for introduction of copy of lost telegram *held* sufficient. *Bradstreet v. Grand Island Banking Co*..... 590
8. Competent, relevant testimony of unimpeached witnesses cannot be contradicted by circumstantial evidence, unless the circumstances cannot be reconciled with the conclusion that the direct evidence is true. *Blid v. Chicago & N. W. R. Co*..... 689
9. Nonexpert witnesses may testify whether an injured person with whom they were familiar appeared to be suffering pain, and as to the appearance of her injury. *Struble v. Village of DeWitt*..... 726
10. One skilled in the use of automobiles may testify as to the distances in which such a machine may be stopped when going at different rates of speed. *Blado v. Draper*.. 787

Exceptions, Bill of. See APPEAL AND ERROR, 41, 42.

Execution.

1. Purchaser at execution sale *held* to have waived all errors and irregularities in the sale and the order of confirmation. *Storz Brewing Co. v. Hansen*..... 685
2. Where the execution creditor, who also held a decree of foreclosure of mortgage on property of an insolvent debtor, purchased it at execution sale, *held* that motion to require the officer to pay amount of bid over execution debt into court for benefit of the debtor will not be sustained. *Storz Brewing Co. v. Hansen*..... 685

Executors and Administrators. See EMINENT DOMAIN.

1. The proceeding to sell land of a decedent for his debts provided by sec. 67 *et seq.*, ch. 23, Comp. St. 1909, partakes of the nature of a proceeding *in rem*. *Miller v. Hanna*..... 224
2. Where an order to sell land of a decedent for debts does not comply with the statute, the court should refuse to confirm the sale. *Miller v. Hanna*..... 224
3. The care and judgment which a man of average capacity exercises in his own business is what is required of an administrator. *In re Estate of Bush*..... 334
4. Where an administrator mingles funds of the estate with his own and uses them for his own benefit, he is chargeable with interest. *In re Estate of Bush*..... 334
5. An ancillary administrator *held* entitled to recover court costs and attorney's fees where a claim in suit was settled by compromise. *In re Estate of Bush*..... 334
6. The county court can allow a reasonable amount as a claim against an estate to attorneys employed by executors, where those in control of the estate refuse to pay the claim. *Hazlett v. Estate of Moore*..... 372
7. Parties *held* to have waived the right to object to report of referee on the ground that his findings of fact were insufficient. *In re Estate of Holloway*..... 403

Fees. See EVIDENCE, 3. JUDGES, 1. JUSTICE OF THE PEACE, 1. STATUTES, 1.

Fences.

1. An oral agreement as to a boundary line, acquiesced in for more than ten years, *held* binding on the parties and their successors with notice. *Meyer v. Perkins*..... 59
2. Neither proprietor can remove his portion of a division hedge fence, except as provided by sec. 10, art. II, ch. 2, Comp. St. 1889. *Meyer v. Perkins*..... 59

Fences—Concluded.

3. Where adjoining proprietors cannot agree concerning the trimming of a division hedge, they should submit the matter to the fence viewers, whose order is binding. *Meyer v. Perkins*..... 59
4. Equity has authority to enjoin the unlawful destruction of a hedge fence. *Meyer v. Perkins*..... 59

Food. See CONSTITUTIONAL LAW, 5.

1. Ch. 33, Comp. St. 1909, requiring branding of food packages, held to impose no obligation on a manufacturer in another state. *In re Agnew*..... 306
2. The pure food law (Comp. St., 1909, ch. 33) held to be confined to the regulation of intrastate commerce. *In re Agnew* 306
3. A wholesale manufacturer of lard in package form held not exempt from the requirement of secs. 8, 22, ch. 33, Comp. St. 1909, as to marking weight on packages. *Friedrich v. State*..... 343
4. Under sec. 8, ch. 33, Comp. St. 1909, a package of cottoline, sold for use in Nebraska, must bear a statement on the label of its net weight or measure, unless it contains the other brands and marks provided in the first or second subdivisions of the proviso. *Lichtensteiger v. State*..... 356

Fraud.

- A buyer is justified in relying on a representation made as a positive statement of fact, where an investigation would be required to discover the truth. *Brucker v. Kairn*..... 274

Fraudulent Conveyances. See TRUSTS, 5.

- Conveyance by husband to wife held fraudulent as to existing creditors and as to debts which he contemplated incurring. *Omaha Cattle Loan Co. v. Shelly*..... 502

Gaming. See CONTRACTS, 11. CRIMINAL LAW, 9.

1. A slot machine held a gambling device. *Muller v. Stoecker Cigar Co*..... 438
2. Conducting a cigar store where slot machines are set up for the use of customers held an illegal business. *Muller v. Stoecker Cigar Co*..... 438

Guardian and Ward. See EMBEZZLEMENT. INSANE PERSONS.**Habeas Corpus.**

- In an original application for a writ of habeas corpus, the applicant must show that his detention is unlawful. *In re Page*..... 299

Highways. See NEGLIGENCE, 3, 4. RAILROADS, 3.

1. One-half of money collected by a county for a road fund on property of a city or village *held* to belong to such city or village, and that the officers of such city or village have no power to compromise the right to such money. *State v. Bisping*..... 100
2. Certain allegation *held* too indefinite to furnish a basis for a compromise between a county and a city as to a road fund. *State v. Bisping*..... 100
3. Duty of driver of automobile at street crossing stated. *Smith v. Coon*..... 776
4. Under secs. 110-113, ch. 78, Comp. St. 1909, a drainage district must maintain crossings wherever the ditch crosses streets of an incorporated city or village. *State v. Papillion Drainage District*..... 808
5. Petition to open a county road *held* sufficiently definite as to description of line of road. *Dettman v. Pittenger*..... 825
6. One filing a claim for damages waives irregularities in proceedings to open a county road. *Dettman v. Pittenger*.... 825

Homicide. See CRIMINAL LAW, 12.

1. Information for causing death in automobile collision *held* sufficient to charge manslaughter. *Schultz v. State*..... 34
2. In a prosecution for manslaughter by operating an automobile at an unlawful rate of speed, *held* proper to define an unlawful rate of speed in the language of sec. 147, ch. 78, Comp. St. 1909. *Schultz v. State*..... 34
3. One who wilfully and negligently drives an automobile at a rate of speed forbidden by statute, and thereby causes the death of another, is guilty of criminal homicide. *Schultz v. State*..... 34
4. Contributory negligence *held* no defense to a prosecution for manslaughter. *Schultz v. State*..... 34
5. Where one wilfully and negligently operated his automobile at a rate of speed in violation of sec. 147, ch. 78, Comp. St. 1909, and ran into another automobile, killing deceased, negligence of the driver of such other automobile *held* no defense to a prosecution for manslaughter. *Schultz v. State*. 34
6. Evidence *held* to support conviction of manslaughter. *Schultz v. State*..... 34
7. Requested instruction that the court could find accused guilty of assault *held* properly refused; there being no evidence to sustain it. *Clarence v. State*..... 762
8. Evidence *held* to sustain conviction of manslaughter, but of low grade, requiring reduction of sentence from ten to two years. *Clarence v. State*..... 762

Husband and Wife. See DAMAGES, 6. FRAUDULENT CONVEYANCES, TRUSTS, 1-3.

1. A married woman who has no separate estate may make a binding contract to compensate an attorney to prosecute or defend a suit for divorce. *Tyler v. Winder*..... 409
2. In an action for criminal conversation and alienation of a wife's affections, the weight of the evidence and inferences to be drawn therefrom are questions for the jury. *Wheeler v. Abbott*..... 455
3. Adultery may be proved by circumstantial evidence. *Wheeler v. Abbott*..... 455

Indictment and Information. See HOMICIDE, 1.

Where a statute states the elements of a crime, it is generally sufficient in an information to describe the crime in the language of the statute. *Goff v. State*..... 287

Infants. See WILLS, 6, 7.

1. Where an infant disaffirms a conditional sale contract, title to the property remains in the vendor, and right to recover partial payments rests with the infant. *Curtice Co. v. Kent*, 496
2. In replevin, where the defense was infancy and partial payment, *held* that the right of property and right of the infant to recover money paid could both be tried in the same action. *Curtice Co. v. Kent*..... 496
3. It is the duty of the court to protect the interest of a minor by refusing to allow more than reasonable attorney's fees for services in contesting a will. *Everson v. Hurn*..... 716

Injunction. See FENCES, 4. MANDAMUS, 8. RELIGIOUS SOCIETIES, 3. WATERS, 5, 6.

1. Equity may enjoin a police officer from transferring money taken from burglars who stole it from a bank, and may restore it to the owner. *Ætna Indemnity Co. v. Malone*.... 260
2. Service of summons indorsed "Injunction allowed," as required by statute, *held* sufficient notice of granting temporary injunction, and a sufficient compliance with a condition of the order requiring notice. *State v. Dungan*..... 738
3. Order of county judge granting temporary injunction *held* not void for want of jurisdiction because the affidavit failed to show that the judges of the supreme court were absent from the county. *State v. Dungan*..... 738
4. Irregularity in granting temporary injunction for want of prayer therefor in petition *held* not a jurisdictional defect preventing plaintiff from superseding an order dissolving such temporary injunction. *State v. Dungan*..... 738

Injunction—Concluded.

5. A county judge having no power to grant a perpetual injunction, an order purporting to do so will be treated as a temporary injunction, and not void. *State v. Dungan*.... 738
6. An order restraining a party absolutely, without providing for a hearing, is not a temporary restraining order, but an injunction, and an order dissolving it may be superseded. *State v. Dungan*..... 738
7. Technical defect in petition for injunction held not to deprive the court of jurisdiction to determine whether a temporary injunction should be granted, nor to render an order granting the writ subject to collateral attack for want of jurisdiction. *State v. Dungan*..... 738

Insane Persons.

1. County courts have original jurisdiction of settlement of accounts of guardians of insane persons by Const., art. VI, sec. 16. *Spence v. Miner*..... 610
2. It is the duty of guardian of estate of insane person to take possession and bring the estate under jurisdiction of the court. *Spence v. Miner*..... 610
3. It is the duty of guardian of insane person to furnish him with the necessaries of life suitable to his condition out of his estate. *Spence v. Miner*..... 610
4. Courts of equity may determine equitable rights of insane person under guardianship in actions *in rem*. *Spence v. Miner* 610
5. County courts have exclusive original jurisdiction of personal actions for necessaries against estates of insane persons. *Spence v. Miner*..... 610
6. Personal judgment by justice of the peace against an insane person under guardianship for necessaries will be vacated in equity at suit of guardian, and execution sale thereon enjoined. *Spence v. Miner*..... 610

Insurance. See EVIDENCE, 1, 2, 6. TRIAL, 10.

1. Receiver of insolvent insurance company cannot join in one action for unpaid assessments resident and nonresident policy-holders of a county. *Burke v. Scheer*..... 80
2. A single suit in equity cannot be maintained by the receiver of an insolvent mutual hail insurance company for the separate liability of each policy-holder for unpaid assessments. *Burke v. Scheer*..... 80
3. Sec. 121, ch. 43, Comp. St. 1909, fixes the maximum liability of members of mutual hail insurance companies. *Burke v. Scheer*..... 80

Insurance—Concluded.

4. Agent of a fire insurance company *held* to have power to waive proofs of loss, notwithstanding provision in policy that authorization to act in any manner relating to the insurance must be in writing. *Morgenstern v. Insurance Co.*.. 459
5. In an action on a valued policy of insurance, *held* not reversible error to refuse charge that the burden of proof was on plaintiff to show that the fire was not caused by his criminal act, in view of the pleadings and evidence. *Morgenstern v. Insurance Co.*..... 459
6. Evidence as to waiver of proofs of loss *held* to sustain finding for plaintiff. *Morgenstern v. Insurance Co.*..... 459
7. Evidence *held* sufficient to require submission of question of waiver of proofs of loss to the jury. *Morgenstern v. Insurance Co.*..... 459
8. The question of the murder of the assured by the beneficiary suing on the policy being one of fact for the jury, their finding on conflicting evidence is conclusive. *Lillie v. Modern Woodmen of America*..... 1
9. The fact, if true, that the beneficiary had murdered the assured *held* a defense to an action on a benefit certificate. *Lillie v. Modern Woodmen of America*..... 1
10. Verdict of a coroner's jury that insured died as the result of poison self-administered *held* not competent evidence in an action on the policy. *Walden v. Bankers Life Ass'n.*.... 546
11. The burden is on an insurance company to prove defense that deceased came to his death from poison self-administered. *Walden v. Bankers Life Ass'n.*..... 546
12. Defense of suicide *held* not established unless evidence excludes all reasonable probability of death by accident or from natural causes. *Walden v. Bankers Life Ass'n.*..... 546
13. In an action on a life insurance policy, evidence *held* to sustain verdict for plaintiff. *Walden v. Bankers Life Ass'n.*..546
14. In an action on a benefit certificate, verdict for plaintiff on conflicting evidence sustained. *Sampson v. Ladies of the Maccabees of the World*..... 641
15. In an action on benefit certificate, plaintiff *held* entitled to recover \$2,500 for permanent disability, with interest thereon from date of accident. *Tomson v. Iowa State Traveling Men's Ass'n.*..... 791

Interest. See EXECUTORS AND ADMINISTRATORS, 4. JUDGMENT, 6.

Judges.

1. A police judge sued under sec. 34, ch. 28, Comp. St. 1909, for taking excessive fees cannot justify on the ground of

Judges—Concluded.

mistake, ignorance, absence of corrupt motive, or agreement with the party injured. *Downey v. Coykendall*..... 21

2. An attorney, by presenting a question of law in the district court, is not disqualified from sitting in a case on appeal presenting the same question, he having become a member of the supreme court. *Hamilton County v. Aurora Nat. Bank* 256

Judgment. See DIVORCE, 4.

1. Decree quieting title and canceling a mortgage as barred by limitations before the expiration of ten years after maturity of the debt held erroneous. *McCarthy v. Benedict*, 293
2. Decree quieting title and canceling a mortgage held not binding upon the then holder of the note and mortgage unless he were a party to the suit. *McCarthy v. Benedict*.... 293
3. In a suit to enjoin a mortgage foreclosure sale by one having a decree quieting title and canceling the mortgage, it is incumbent upon him to show that the holder of the mortgage was a party to such suit. *McCarthy v. Benedict*..... 293
4. Several actions may be brought and several judgments recovered against several wrongdoers, though but one satisfaction can be had. *Fitzgerald v. Union Stock Yards Co.* 393
5. The assignee of a judgment takes it subject to equities which the judgment debtor had against the judgment creditor. *State v. Holt County*..... 445
6. A judgment, when revived, draws interest from the date of its rendition. *McDonald v. Thomas County*..... 494

Judicial Sales. See APPEAL AND ERROR, 18, 19.

1. That the sheriff did not sell one lot described in the decree is not a good objection to confirmation of the sale of other lots therein described. *Stephenson v. Murdock*..... 818
2. An order of sale is not necessary to clothe the sheriff with authority to make the sale under a decree. *Stephenson v. Murdock* 818
3. An order of confirmation will not be reversed because the clerk withdrew a parcel of land from the operation of the decree. *Stephenson v. Murdock*..... 818

Justice of the Peace. See INSANE PERSONS, 6.

1. Rule for fixing fees stated where a complaint is filed against several persons. *Downey v. Coykendall*..... 21
2. Where on appeal from a justice it appears that he inadvertently omitted a portion of the proceedings from the transcript, the district court should permit the transcript to be amended. *Summers v. Chisholm*..... 324

Justice of the Peace—Concluded.

3. On appeal from justice court, filing of reply *held* not to change the issues. *Summers v. Chisholm*..... 324

Landlord and Tenant.

- Acts of defendant held a ratification of a lease procured by duress. *Howell v. Bowman*..... 389

Larceny.

1. Evidence *held* to support a conviction of larceny. *Nixon v. State*..... 109
2. That property stolen was taken without the consent of the owner may be proved by circumstantial evidence. *Nixon v. State*..... 109
3. Sentence to the penitentiary for three years for stealing property of the value of \$50 *held* excessive. *Nixon v. State*.. 109

Libel and Slander.

1. To say of a school teacher that she is crazy and an unmerciful liar and unfit to teach school is actionable *per se*. *Fitzgerald v. Young*..... 693
2. In an action for slander, pleading and proof of special damages are unnecessary, where the imputation is actionable *per se*. *Fitzgerald v. Young*..... 693
3. Where words actionable *per se* are proved as pleaded, the court should not sever the words or phrases composing the defamatory matter and charge that the other parts are not defamatory. *Fitzgerald v. Young*..... 693
4. A witness need not state in one answer all defamatory matter pleaded, but he may state it in several answers, and show that it was published in one conversation in the sense alleged. *Fitzgerald v. Young*..... 693
5. A defamer who publishes a slander may be held liable for the consequences of later publications resulting from his act. *Fitzgerald v. Young*..... 693
6. In an action for slander, the defense of privilege, to be available, must be proved. *Fitzgerald v. Young*..... 693
7. Where plaintiff pleads that slanderous words were spoken to a third person and others, proof that the words were spoken to such third person alone will sustain a recovery. *Fitzgerald v. Young*..... 693
8. Where malice is an issue, plaintiff may show that defendant repeated the slanderous words both before and after commencement of suit. *Fitzgerald v. Young*..... 693

Life Estates. See LIMITATION OF ACTIONS, 5.

1. Recording of deed conveying the entire estate by a life tenant who remained in possession *held* not to start running

Life Estates—Concluded.

- of limitations against action to quiet title by remainderman under secs. 10868, 10870, Ann. St. 1909. *Maurer v. Reifschneider* 673
2. Possession of land by life tenant *held* not adverse to remainderman, unless knowledge is clearly brought home to him that the life tenant claimed the entire estate. *Maurer v. Reifschneider*..... 673

Limitation of Actions. See LIFE ESTATES, 1. TENANCY IN COMMON.

1. Where the right to sue to recover land is barred by limitations during the lifetime of one claiming title, the right of his heirs is also barred. *Keleher v. Kelly*..... 127
2. Items of a running account *held* not barred by the statute of limitations. *In re Estate of Holloway*..... 403
3. Ordinarily limitations will not run against a creditor's bill until the demand is reduced to judgment. *Omaha Cattle Loan Co. v. Shelly*..... 502
4. Under sec. 22 of the code, letters written by purchaser of mortgaged land to mortgagee *held* to arrest the running of limitations. *Girard Trust Co. v. Dixon*..... 557
5. Suit by remainderman to quiet title *held* not to accrue until knowledge that life tenant is claiming the fee is brought home to him. *Maurer v. Reifschneider*..... 673

Mandamus.

1. Where demurrer to application for mandamus or to the alternative writ is overruled, the respondent should ordinarily be allowed to answer. *State v. Bisping*..... 100
2. Where a substantial issue of fact is presented in mandamus, the alternative writ should be returnable to the county where the action is pending. *State v. Bisping*..... 100
3. The alternative writ must contain all of the facts upon which relator relies. *State v. Bisping*..... 100
4. The writ and return or answer thereto constitute the issues in mandamus. *State v. Bisping*..... 100
5. Where no substantial issue of fact is presented by the objections of respondents, the court may issue a peremptory writ of mandamus. *State v. Bisping* 100
6. If a general denial to the application for mandamus is inconsistent with other allegations in the answer, such general denial should be disregarded. *State v. Bisping*..... 100
7. Certain denial in answer *held* to constitute no defense in mandamus. *State v. Bisping*..... 100
8. Certain allegations *held* to constitute no defense in mandamus. *State v. Bisping*..... 100

Mandamus—Concluded.

9. In mandamus in supreme court to require judge of district court to fix amount of undertaking to supersede order dissolving temporary injunction, merits of controversy in original action will not be considered. *State v. Dungan*..... 738

Master and Servant.

1. Employment in the service of a common master held not alone to constitute two men fellow servants. *Nocita v. Omaha & C. B. Street R. Co.* 209
2. One qualifying as a street railway conductor, though he receives no wages, held a fellow servant of the motorman. *Justus v. Lincoln Traction Co.*..... 542
3. A trackman working where he could not see cars shunted on the track has a right to rely on his foreman's custom to watch and warn him of approaching cars. *Swanson v. Union Stock Yards Co.*..... 361
4. A trackman injured by a moving car held not guilty of contributory negligence. *Swanson v. Union Stock Yards Co.*.. 361
5. It is the duty of an employer to furnish his employees a safe place in which to work, and to inform him of all latent dangers connected with the employment. *Gundy v. Nye-Schneider-Fowler Co.*..... 599
6. Where the evidence is conflicting, it is for the jury to determine whether an employer has furnished a safe place to work and informed employee of latent dangers. *Gundy v. Nye-Schneider-Fowler Co.*..... 599
7. Contract of employment construed, and employee held entitled to part of bonus provided therein. *Kinder v. Cushman Motor Co.*..... 619
8. Evidence held to show that plaintiff, with full knowledge of existing conditions, assumed the risk, and that his own negligence was the proximate cause of an injury. *Creighton v. Keens*..... 637
9. Where two persons are sued jointly for negligence of a third who was general agent of one, and at the time was acting for the other, a verdict against his general employer, but exonerating the other, held inconsistent. *Forsha v. Nebraska Moline Plow Co.*..... 770
10. One in the general employment of one person may be temporarily in the service of another so that the relation of master and servant arises, though the general employer may have an interest in the special work. *Forsha v. Nebraska Moline Plow Co.*..... 770

Mechanics' Liens.

1. Foreclosure of mechanic's lien will not be denied because of omissions in details of work or time of completion. *McGowan v. Gate City Malt Co.*..... 10
2. Substantial compliance with contract *held* sufficient to enable subcontractor to enforce his lien. *McGowan v. Gate City Malt Co.*..... 10
3. In a suit to cancel record of filing of mechanic's lien, *held* that finding for plaintiffs was sustained by the evidence. *Russell v. Haines.*..... 650

Mortgages. See ATTORNEY AND CLIENT, 8. JUDGMENT, 1-3.

1. A provision in a mortgage that the debt and interest should become due upon failure to pay interest *held* optional with the mortgagee. *McCarthy v. Benedict.*..... 293
2. A second mortgage executed to correct a mistake in the first supersedes the first. *Rossbach v. Micks.*.....821

Municipal Corporations. See CONSTITUTIONAL LAW, 2-4. HIGHWAYS, 1-4. NEGLIGENCE, 3, 4.

1. The legislature may require cities of the metropolitan class and first class to pension superannuated firemen and to pay the pensions from the funds of the fire department. *State v. Love.*..... 149
2. A city fireman who had served more than 21 years *held* entitled to a pension under ch. 39, laws 1895. *State v. Love,* 149
3. A city fireman *held* entitled only to the service pension provided by law at the time of his retirement. *State v. Love* 149
4. Vacation of a recorded plat of an addition to a village *held* to divest rights of the public in the streets shown therein, and that such vacated streets revert to the proprietors of adjoining lots. *Hart v. Village of Ainsworth.*..... 418
5. Charter of city of Omaha *held* not to vest the city engineer with authority to compel the water company to elevate its water-mains. *State v. Omaha Water Co.*..... 553
6. Adoption of plans for a sewer by the mayor and council of a city *held* not an exercise of police power, so as to require a water company to elevate a water-main unexpectedly encountered in constructing a sewer. *State v. Omaha Water Co.* 553
7. Existence of a step at intersection of cross-walk with a sidewalk *held* not to constitute actionable negligence. *Gilliland v. City of Omaha.*..... 668
8. City *held* not liable to one who slipped and was injured in stepping about eight inches from a cross-walk to an intercepting sidewalk. *Gilliland v. City of Omaha.*..... 668

Municipal Corporations—Concluded.

9. In an action for injuries from a defective walk, evidence held not to show such contributory negligence as to require a peremptory instruction for defendant. *Struble v. Village of DeWitt*..... 725

Names. See PROCESS. QUIETING TITLE, 5. VENDOR AND PURCHASER, 8.

Negligence. See BAILMENT. CARRIERS. MASTER AND SERVANT, 4, 8. MUNICIPAL CORPORATIONS, 8. TRIAL, 1.

1. One who sets out a fire on his own premises without taking reasonable precautions to prevent it from spreading is negligent. *Hawkins v. Collins*..... 140
2. Where evidence as to negligence and contributory negligence is conflicting, the court should refuse to direct verdict for defendant. *Smith v. Coon*..... 776
3. Pedestrian bewildered by the approach of an automobile at a street crossing held not, as a matter of law, guilty of contributory negligence. *Smith v. Coon*..... 776
4. An automobile driver who in passing a carriage from the rear on a public street strikes it and injures the occupant is liable for injuries caused by his negligence. *Blado v. Draper* 787

New Trial. See APPEAL AND ERROR, 35.

1. The statute requiring a written motion for new trial to be made at the term and within three days after rendition of verdict held mandatory. *Summers v. Chisholm*..... 324
2. Where, in a suit for a new trial of an action at law, it appears that plaintiff's evidence in the law action was insufficient, a new trial will not be granted, notwithstanding plaintiff was prevented by accident from securing a transcript in time for an appeal. *Justus v. Lincoln Traction Co.*, 542
3. A new trial will not be granted for newly discovered evidence, merely cumulative or of doubtful character. *Blado v. Draper*..... 787

Notice. See ATTORNEY AND CLIENT, 4. TAXATION, 1, 4, 8-10. WILLS, 1.

Officers.

1. Under sec. 20, art. III of the constitution, vacancies in offices created by the constitution must be filled under the general law, where no provision is made therefor in the constitution. *State v. Furse*.....652
2. Where the governor removes a notary from office, he is not entitled to trial *de novo* on error to the district court, and it is error to order a reversal for want of prosecution, and enter judgment for costs against defendant in error. *Cohn v. Butterfield*..... 849

Pardon.

1. Under sec. 570 of the criminal code, a parole granted by the governor to a convict may be revoked at any time, without notice or hearing. *Owen v. Smith*..... 596
2. Revocation of parole by the governor under sec. 570 of the criminal code is an exercise of discretion, not reviewable by the courts. *Owen v. Smith*..... 596

Parties. See INSURANCE, 1. QUIETING TITLE, 3.

Partition.

Where proceedings in partition are amicable, the court may allow an attorney's fee to be paid by the parties in proportion to their interest. *Harper v. Harper*..... 269

Physicians and Surgeons.

Information for practicing medicine without license held not to negative the fact that a license may have been filed with the county clerk of the county where the accused resides. *Wilson v. State*..... 258

Pleading. See APPEAL AND ERROR, 27, 37, 38, 40. CONTRACTS, 9, 10. DAMAGES, 2. DIVORCE, 10. ESTOPPEL, 2. JUSTICE OF THE PEACE, 3. LIBEL AND SLANDER, 2. MANDAMUS. QUIETING TITLE, 1, 2. SALES. TRIAL, 9. TRUSTS, 3.

Leave to amend pleadings at the trial should be granted only on terms which will avoid prejudice to the opposite party. *Gundy v. Nye-Schneider-Fowler Co*..... 599

Prisons. See COUNTIES AND COUNTY OFFICERS, 3, 4.

Process.

To be ignorant of either the given name or surname of a person is to be ignorant of his name within sec. 148 of the code. *McNamara v. Gunderson*..... 112

Quieting Title. See JUDGMENT, 1-3. LIFE ESTATES, 1. LIMITATION OF ACTIONS, 5.

1. Answer in suit to remove mortgage as cloud on title held not subject to general demurrer. *Frederick v. Gehling*.... 93
2. Answer in suit to remove mortgage as a cloud on title held to state a defense as against a general demurrer. *Frederick v. Gehling*..... 93
3. In suit to remove mortgage as a cloud on title, the owner of the fee may intervene and contest plaintiff's title and assert the homestead character of the land. *Frederick v. Gehling* 93
4. Grantee in deed held estopped, in action to quiet title, as against purchaser at tax foreclosure sale, to allege that his grantor's true name was not as stated in the deed to the grantor. *Stratton v. McDermott* 622

Quieting Title—Concluded.

5. The surname and initial letter may constitute the full name, and, when a grantee is so named, it will not be presumed that he has another name. *Stratton v. McDermott*.. 622
6. In suit to quiet title of remainderman as against a life tenant, equity will require as condition of relief that plaintiff pay her proportion of mortgage lien on premises at death of common ancestor paid by life tenant. *Maurer v. Reifschneider*..... 673

Railroads.

1. Defendant held liable for horses killed by reason of defendant's failure to maintain a fence as required by sec. 1, art. I, ch. 72, Comp. St. 1909. *Larson v. Chicago & N. W. R. Co.*.. 247
2. Evidence held insufficient to sustain verdict for plaintiff for killing of live stock. *Blid v. Chicago & N. W. R. Co.*.. 689
3. The power to open streets and control railway crossings in incorporated cities and villages is given by statute to the municipal authorities, and the authority of the state railway commission is limited to crossings outside of cities and villages. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*..... 853

Reference. See APPEAL AND ERROR, 12. EXECUTORS AND ADMINISTRATORS, 7.

Reformation of Instruments. See BILLS AND NOTES, 2, 3.

Religious Societies.

1. Decrees of governing authority as to church government are binding on local associations, and courts will not ordinarily review them. *Parish of the Immaculate Conception v. Murphy*..... 524
2. The trustees of a religious corporation organized under sec. 40, ch. 16, Comp. St. 1899, and in conformity with the canons and discipline of the Roman Catholic church cannot authorize an excommunicated priest to occupy the corporation's church edifice or to exercise the faculties of priest therein. *Parish of the Immaculate Conception v. Murphy*.. 524
3. If a majority of the trustees of a religious body unite in diverting the temporalities of the corporation from the purposes of its founders, a minority may sue in the corporate name to enjoin such diversion. *Parish of the Immaculate Conception v. Murphy*..... 524

Remainders. See LIFE ESTATES. LIMITATION OF ACTIONS, 5.

Replevin. See INFANTS, 2.

Sales.

1. Petition in action for breach of contract held not demurrable. *Omaha Cooperage Co. v. Central States Cooper-
age Co.*..... 221
2. Petition held sufficient in an action for damages for false representations in sale of horse. *Brucker v. Kairn*..... 274

Schools and School Districts.

1. Under sec. 3, subd. XV, ch. 79, Comp. St. 1909, an election on the issue of school district bonds without a petition therefor is invalid. *Allen v. School District*..... 205
2. An election to vote on the issue of school district bonds for "building and furnishing a new school house" held invalid where the petition called for bonds "to build a new public school building." *Allen v. School District*..... 205

Specific Performance.

- Where failure to convey land is due to refusal of the purchaser to pay purchase price, he is not entitled to specific performance. *Rosbach v. Micks*..... 821

Statutes. See FOOD.

1. Statutes giving fees will be strictly construed and not extended by implication. *Downey v. Coykendall*..... 21
2. Proviso defined. *Lichtensteiger v. State*..... 356

Stipulations. See TRIAL, 3, 4.**Supersedeas. See INJUNCTION, 4, 6.****Taxation. See ABANDONMENT. CONSTITUTIONAL LAW, 2. COUNTIES AND COUNTY OFFICERS, 1, 2.**

1. Proof of publication of notice of time of redemption from tax sale by affidavit sworn to before one without authority to administer oaths renders void a tax deed issued thereon. *Lanning v. Haases*..... 19
2. In foreclosure of tax lien without an administrative sale, where there was no personal service or appearance, and the land was not made a party, and there was no compliance with sec. 148 of the code, held that the court was without jurisdiction to render a decree depriving the owner of his right of redemption. *McNamara v. Gunderson*.... 112
3. A county treasurer's return of public sales of lands for taxes must be certified and signed by him. *Tate v. Biggs*.. 195
4. Treasurer's notice of tax sale held invalid. *Tate v. Biggs*.. 195
5. Comp. St. 1903, ch. 77, art. I, secs, 220, 221, construed, and held that a tax deed is not conclusive evidence of all matters not recited in sec. 221. *Tate v. Biggs*..... 195

Taxation—Concluded.

6. Sec. 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) *held* not to mean that a tax deed shall be conclusive evidence of all matters not recited in that section. *Gallatin v. Tri-State Land Co.*..... 235
7. A county treasurer must make return of his public sales of real estate for taxes to the county clerk, as provided by sec. 205, art. I, ch. 77, Comp. St. 1903, before he can sell lands at private tax sale. *Gallatin v. Tri-State Land Co.* 235
8. County treasurer's notice of tax sale must contain substantially all matters specified in the statute. *Gallatin v. Tri-State Land Co.*..... 235
9. Secs. 11012, 11031, Ann. St. 1909, *held* to authorize a county assessor, on notice, to add to schedule of taxpayer any taxable property which has been omitted. *Bankers Life Ins. Co. v. County Board of Equalization*..... 469
10. Any substantial increase of the schedule of a taxpayer without notice *held* the taking of property without due process of law, and void. *Bankers Life Ins. Co. v. County Board of Equalization*..... 469
11. Where a taxpayer files complaint before the board of equalization, objecting to change in his schedule, and has a hearing thereon, he cannot thereafter challenge jurisdiction of the board over the subject matter of the complaint. *Bankers Life Ins. Co. v. County Board of Equalization*.... 469
12. Method to determine value of capital stock of domestic insurance companies stated. *Bankers Life Ins. Co. v. County Board of Equalization*..... 469
13. An assessment of a domestic insurance company, which includes its capital stock, surplus, contingent reserves, gross premium receipts mentioned in sec. 10960, Ann. St. 1909, and tangible property, *held* excessive and double taxation. *Bankers Life Ins. Co. v. County Board of Equalization* 469
14. The right to take by will a credit payable in New York, but evidenced by a contract of sale for land in Nebraska in possession of the vendor at his residence in New York, *held* not subject to an inheritance tax under sec. 10706, Ann. St. 1903. *Dodge County v. Burns*..... 534

Tenancy in Common.

1. Limitations will begin to run in favor of a cotenant in possession claiming title as soon as knowledge of his adverse claim is brought home to other cotenants. *Keleher v. Kelly*..... 127

Tenancy in Common—Concluded.

2. Where one tenant in common enters upon the whole estate, improves it, pays the taxes, and claims it for more than the period of limitation, an actual ouster will be presumed. *Lund v. Nelson*..... 449

Torts.

1. Settlement with one of several joint tort-feasors *held* not a defense to an action against another, unless it was agreed that such settlement should be in full of all damages. *Fitzgerald v. Union Stock Yards Co.*.....393
2. Payment of damages in full settlement by one joint tort-feasor releases all. *Fitzgerald v. Union Stock Yards Co.* 393

Trial. See APPEAL AND ERROR. ASSAULT AND BATTERY, 2. ATTACHMENT. CARRIERS, 1. CRIMINAL LAW. DAMAGES, 4, 5. DRAINS, 2. HUSBAND AND WIFE, 2. INSURANCE, 5, 7. LIBEL AND SLANDER, 3. MASTER AND SERVANT, 6, 9. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 2. VENUE, 2.

1. It is for the court to say what act or omission is evidence of negligence, but for the jury to say whether the evidence established negligence. *Nocita v. Omaha & C. B. Street R. Co.*..... 209
2. It is for the court to determine whether evidence of a confidential nature offered by defendant is a part of subject matter testified to by plaintiff. *Struble v. Village of DeWitt* 726
3. An agreed stipulation of facts should contain nothing but the material facts in issue. *In re Page*..... 299
4. Certain exhibits referred to in an agreed stipulation of facts *held* part of the evidence. *In re Page*..... 299
5. If the evidence is substantially conflicting upon a material issue, it presents a question for the jury. *Fitzgerald v. Union Stock Yards Co.*..... 393
6. In order to predicate error on rejection of testimony on direct examination, complainant must make offer to prove facts he expects to show by such testimony. *Walden v. Bankers Life Ass'n*..... 546
7. A special finding, though sustained by the evidence, must be disregarded when the fact established is irrelevant to the issues. *Hawe v. Higgins*..... 575
8. Where the jury fails to find a verdict according to the law as given in the instructions, the court should set it aside. *Hawe v. Higgins*..... 575
9. Objection to evidence *held* insufficient to raise the question that damage to pasture land was not sufficiently pleaded. *Boyd v. Lincoln & N. W. R. Co.*..... 840

Trial—Concluded.

10. In an action on a benefit certificate, an instruction that the result of a criminal prosecution for the murder of the assured by the beneficiary was not to be considered, *held* properly given. *Millie v. Modern Woodmen of America*.. 1
11. Where no question of fact is to be determined, *held* not error to direct a verdict. *Downey v. Coukendall*..... 21
12. If an affirmative defense is supported by sufficient competent evidence, it is error to withdraw it from the jury. *Hoover v. DeKlotz*..... 146
13. Where both parties request a directed verdict, they waive the right to have any question of fact submitted to the jury. *Martin v. Harvey*..... 173
Howell v. Bowman..... 389
14. A motion by defendant for a directed verdict admits the truth of all material evidence submitted and inferences to be drawn therefrom. *Wheeler v. Abbott*..... 455
15. Where defendant introduces evidence after the overruling of motion to direct verdict, he waives right to assign error in the ruling. *Bradstreet v. Grand Island Banking Co.* 590
16. It is not error to refuse instructions covered by instructions given. *Bradstreet v. Grand Island Banking Co.*..... 590
17. Instructions will not be reviewed where no exceptions were taken until filing of motion for new trial. *Bradstreet v. Grand Island Banking Co.*..... 590
18. Instructions in action for death as to measure of damages *held* not erroneous. *Gundy v. Nye-Schneider-Fowler Co.*.... 599
19. Refusal of instruction applicable to the evidence not covered by those given *held* error. *Forsha v. Nebraska Moline Plow Co.*..... 770
20. Where the court has given full instructions on defendant's theory of the case, *held* not error to refuse additional instructions thereon. *Blado v. Draper*..... 787

Trusts.

1. Where title to land paid for by a husband is taken in the name of the wife, a resulting trust arises in favor of the husband. *Woodward v. Woodward*..... 142
2. That property paid for by a husband, with title in the wife, was purchased upon an oral agreement of the wife does not destroy the resulting trust arising from the transaction. *Woodward v. Woodward*..... 142
3. In a suit by a husband to establish a resulting trust against his wife, she may plead a judgment for alimony by supplemental answer, and impress the trust estate with a lien to satisfy the judgment. *Woodward v. Woodward*..... 142

Trusts—Concluded.

4. Where a purchaser of land has the title taken in the name of another, the grantee holds it in trust for the purchaser, and if the trustee, at the owner's request, devises the property, the devisee holds it in trust for such owner. *Cowles v. Cowles*..... 327
5. Where a purchaser of land, not the subject of fraudulent alienation, has the title taken in the name of another to avoid payment of a judgment, such purchaser is not estopped from suing to recover title. *Cowles v. Cowles*..... 327
6. In a suit in equity to enforce a constructive trust as to stolen property, fiduciary relations between the parties held not essential to jurisdiction. *Aetna Indemnity Co. v. Malone*..... 260
7. In a suit in equity to recover stolen funds from a police officer, only a preponderance of evidence is required. *Aetna Indemnity Co. v. Malone*..... 260
8. Evidence held to sustain a finding that other money taken from burglars at the same time an identified coin was taken from them was a part of a certain sum of money stolen from a bank. *Aetna Indemnity Co. v. Malone*..... 260

Usury. See BILLS AND NOTES, 1.

1. Copartner assuming partnership debt held entitled to plead usury, though he has renewed it in his own name. *Bolen v. Wright*..... 116
2. A borrower asking relief in equity from a usurious contract should be required to pay the principal and lawful interest. *Bolen v. Wright*..... 116

Vendor and Purchaser. See SPECIFIC PERFORMANCE.

1. Parties to a written contract for the sale of real estate may by oral agreement destroy the writing and rescind the contract. *Sicker v. Sieker*..... 123
2. Ordinarily there is an implied agreement that the vendor will transfer a good title. *Justice v. Button*..... 367
3. "Good title" defined. *Justice v. Button*..... 367
4. Unreleased trust deed executed to secure a debt held defect in title excusing acceptance of it, though limitations may have barred foreclosure of the trust deed. *Justice v. Button*..... 367
5. A purchaser, while the contract remains executory, may recover the purchase money, if the vendor's title be defective. *Justice v. Button*..... 367
6. One who furnishes money to a purchaser of land in consideration of one-half of the profits held not a joint purchaser. *Hawe v. Higgins*..... 575

Vendor and Purchaser—Concluded.

7. To constitute one furnishing money for purchase of land a joint purchaser, it must appear that he is to become invested with an interest in the title and actual ownership. *Hawe v. Higgins*..... 575
8. If one conveys land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name. *Stratton v. McDermott*.. 622

Venue. See CRIMINAL LAW, 11.

1. Test stated for determining whether an action is rightly brought in one county against a defendant, so that other defendants may be served in another county. *Polenske v. Ennis*..... 88
2. A motion for change of venue is addressed to the discretion of the court. *Smith v. Coon*..... 776

Waters.

1. Every interference by one landowner with natural drainage to the injury of the land of another is unreasonable, if not made in the reasonable use of his own property. *Flesner v. Steinbruck*..... 129
2. Construction of a dike across a natural drain upon farm lands to prevent the flow of unpolluted water from a neighbor's land held not a reasonable use of one's property. *Flesner v. Steinbruck*..... 129
3. A lower proprietor held to have no lawful cause for complaint because an upper proprietor dug ditches to change the course of drainage on his own premises, so long as the water flowed onto the servient estate in a natural drain. *Flesner v. Steinbruck*..... 129
4. An upper proprietor who accelerates the flow of surface water through a natural drain onto his neighbor's land held not liable therefor. *Flesner v. Steinbruck*..... 129
5. A landowner may enjoin the maintenance of a ditch whereby surface water is diverted from its natural course and poured onto his lands. *Hagedorn v. Maly*..... 370
6. Equity will not enjoin an upper proprietor from draining surface water into natural channels onto the land of a lower proprietor. *Perry v. Clark*..... 812
7. A lower proprietor may not obstruct a natural drain, so as to cause surface water to back onto his neighbor's land. *Mapes v. Bolton*..... 815
8. Sec. 1, art. III, ch. 89, Comp. St. 1909, does not authorize the proprietor to obstruct a natural drain, so as to injure his neighbor's crops and land. *Mapes v. Bolton*..... 815

Waters—Concluded.

9. Where stockholders in an irrigation company transferred their stock with intent to retain certain water rights, equity will protect such rights. *Fenton v. Tri-State Land Co.* 479
10. Agreement to pay for property of irrigation company by annual payments or by waiving right to assess the sellers for maintenance of ditch *held* not invalid as against public policy. *Fenton v. Tri-State Land Co.*..... 479
11. Contract with irrigation company to convey a specified quantity of water by means of its canal in perpetuity *held* to convey an easement, and not invalid as a grant exceeding the term of its corporate existence. *Fenton v. Tri-State Land Co.*..... 479
12. Where, in 1891, stockholders of an irrigation canal conveyed it, reserving perpetual water rights, the court will apply ch. 68, laws 1889, and hold their rights equal as to each other, but superior to those of consumers under a new section of canal. *Fenton v. Tri-State Land Co.*..... 479
13. Under ch. 68, laws 1889, portions of an irrigation canal *held* severable as to rights of consumers of water. *Fenton v. Tri-State Land Co.*..... 479
14. Nature, rights and duties of stock corporation formed to construct irrigation canal stated. *Fenton v. Tri-State Land Co.* 479
15. An irrigation company *held*, under its deed, to have purchased the property of another company subject to the rights of all parties holding water rights under the latter company. *Fenton v. Tri-State Land Co.*..... 479

Wills.

1. Under sec. 140, ch. 23, Comp. St. 1909, notice of hearing an application for probate of will may be given by publication, though all relatives of decedent reside in the county where the application is made. *In re Estate of Sieker*..... 216
2. Certain legacies *held* specific legacies. *In re Estate of Bush* 334
3. Rules stated for construing provisions of a will as to the rights of heir. *Heilman v. Reitz*..... 422
4. Will construed, and three-fifths of the net income of the estate *held* to descend to the widow and heirs as intestate property. *Heilman v. Reitz*..... 422
5. A nuncupative will is not effective to pass title to real estate. *Maurer v. Reifschneider*..... 673
6. Where an infant son has been disinherited by his father's will, and the mother successfully contests it in his interest,

Wills—Concluded.

his estate is chargeable with reasonable attorney's fees.

Everson v. Hurn..... 716

7. Agreement for more than a reasonable amount for services of attorney of minor in contesting a will will not be enforced. *Everson v. Hurn*..... 716

Witnesses. See CRIMINAL LAW, 8. EVIDENCE, 4, 9, 10.

1. Where the representative of a deceased person is a party to an action, one having an interest in the controversy cannot identify checks drawn by him and delivered to decedent. *In re Estate of Holloway*..... 403
2. Evidence offered to disprove a collateral statement in a deposition held properly excluded. *Whiteside v. Adams Express Co.*..... 430
3. A letter of a witness identified by him on cross-examination held competent as impeaching evidence. *Gundy v. Nye-Schneider-Fowler Co.*..... 599
4. Reception of writing in evidence as part of the cross-examination of a witness is within the discretion of the trial court. *Gundy v. Nye-Schneider-Fowler Co.*..... 599

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